No. 88-305-CSY
Status: GRANTED

Title: South Carolina, Petitioner
v.
Demetrius Gathers

Docketed:
August 5, 1988

Court: Supreme Court of South Carolina

Counsel for petitioner: Zelenka,Donald J.

Counsel for respondent: Diggs,William Isaac, Savitz III,Joseph L.

Entry	Date	Note	Proceedings and Orders
1	Aug 5 1988	G	Petition for writ of certiorari filed.
2	Sep 19 1988	X	Brief of respondent Demetrius Gathers in opposition filed.
3	Sep 19 1988	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Sep 21 1988		DISTRIBUTED. October 7, 1988
5	Oct 11 1988		Motion of respondent for leave to proceed in forma pauperis GRANTED.
6	Oct 11 1988		Petition GRANTED.
			**********
8	Nov 5 1988		Order extending time to file brief of petitioner on the merits until December 9, 1988.
9	Nov 11 1988		Record filed.
		*	Certified copy of original record received.
10	Dec 2 1988		Joint appendix filed.
12	Dec 7 1988		Brief amici curiae of California, et al. filed.
20	Dec 7 1988	G	Motion of Center for Civil Rights, et al. for leave to file a brief as amici curiae filed.
14	Dec 8 1988		Brief amicus curiae of Mid-America Legal Foundation filed.
15	Dec 8 1988	D	Motion of respondent to dismiss writ of certiorari filed.
11	Dec 9 1988		Brief of petitioner South Carolina filed.
13	Dec 9 1988	G	Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae filed.
16	Dec 14 1988		DISTRIBUTED. Jan. 6, 1989. (Motion of respondent to dismiss petition for writ of certiorari).
17	Dec 22 1988		Opposition of Petitioner to motion of respondent Demetrius Gathers filed.
19	Dec 30 1988		Order extending time to file brief of respondent on the merits until January 23, 1989.
21	Jan 4 1989	X	Brief of Demetrius Gathers in reply to response to motion to dismiss filed.
22	Jan 9 1989		Motion of respondent to dismiss writ of certiorari DENIED.
23	Jan 17 1989		Motion of Center for Civil Rights, et al. for leave to file a brief as amici curiae GRANTED.
24	Jan 23 1989		Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
26	Jan 24 1989		Order extending time to file brief of respondent on the merits until January 31, 1989.
27	Jan 31 1989		Brief amici curiae of NAACP Legal Defense Fund, et al. filed.
28	Jan 31 1989		Brief amici curiae of South Carolina Public Defenders'

No. 88-305-CSY

Entry	Date	Note	Proceedings and Orders
			Assn., et al. filed.
29	Jan 31 1989		Brief of respondent Demetrius Gathers filed.
31	Jan 31 1989	G	Motion of SOLACE, et al. for leave to file a brief as amici curiae filed.
32	Jan 31 1989	G	Motion of Barbara Babcock, et al. for leave to file a brief as amici curiae filed.
33	Feb 3 1989		SET FOR ARGUMENT TUESDAY, MARCH 28, 1989. (2ND CASE)
34	Feb 21 1989		Motion of SOLACE, et al. for leave to file a brief as amici curiae GRANTED.
35	Feb 21 1989		Motion of Barbara Babcock, et al. for leave to file a brief as amici curiae GRANTED.
36	Feb 24 1989		CIRCULATED.
37	Mar 2 1989	X	Reply brief of petitioner South Carolina filed.
38	Mar 28 1989		ARGUED.

(1)

88-305

Supreme Court, U.S.
FILED
AUG 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,
Petitioner,

versus

DEMETRIUS GATHERS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE EIGHTH AMENDMENT PRECLUDE A PROSECUTOR'S COMMENTS DURING A CAPITAL MURDER PENALTY PHASE ON PERSONAL CHARACTERISTICS OF THE VICTIM WHERE THE CHARACTERISTICS ARE BASED ON EVIDENCE ADMITTED IN THE GUILT PHASE TO SHOW THE CIRCUMSTANCES OF THE CRIME?

II. DOES BOOTH v. MARYLAND, 482 U.S. __, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), PRECLUDE PROSECUTORIAL COMMENT DURING A PENALTY PHASE CLOSING ARGUMENT ON EVIDENCE INTRODUCED DURING THE GUILT PHASE OF THE TRIAL THAT REVEALS PERSONAL CHARACTERISTICS OF THE VICTIM?

III. WHETHER THIS COURT'S DECISION IN BOOTH v. MARYLAND, SUPRA, MISCONSTRUED THE REQUIREMENTS OF THE EIGHTH AMENDMENT AND WAS WRONGLY DECIDED?

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No. _____

IN THE
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October Term, 1988

STATE OF SOUTH CAROLINA,
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PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
SOUTH CAROLINA

The Attorney General of South Carolina on behalf of the State of South Carolina petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of South Carolina that reversed and remanded a capital case for a new sentencing proceeding.

OPINION BELOW

The opinion of the South Carolina Supreme Court aftirming in part,

reversing in part and remanding for a new sentencing proceeding was filed on June 6, 1988. The case is reported as State v. Demetrius Gathers, __S.C.__, 369 S.E.2d 140 (1988), and is appended hereto as Appendix A at page 32. Judgment was entered and the remittitur sent to the Court of General Sessions of Charleston County, South Carolina, on June 20, 1988.

JURISDICTION

The petition for certiorari is for review of the opinion of th South Carolina Supreme Court, which is the direct appeal of a criminal murder conviction filed on June 6, 1988. This Court has jurisdiction to review the opinion rendered below pursuant to 28 U.S.C. § 1257(3) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Eighth Amendment to the

United States Constitution which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides: "Nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case involves prosecutorial argument in a penalty phase of a capital murder trial that commented upon non-objected evidence that was introduced in the guilt phase of the trial. The comment and evidence revealed the personal characteristics of the victim at the time of the crime. The comment was held to violate the mandates of this Court's decision in

Booth v. Maryland, 482 U.S.__, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), because it focused extensively on the victim's character.

I. State Court Proceedings:

Demetrius Gathers was indicted at the January 12, 1987, and March 2, 1987, terms of the Court of General Sessions for Charleston County, South Carolina, for murder and criminal sexual conduct first degree. The prosecutor served his statutory notice of intent to seek the death penalty on January 14, 1987. Gathers stood trial before a jury and the Honorable Richard E. Fields, Presiding Judge, from March 16 to March 21, 1987. He was convicted of the crimes on March 20, 1987. On March 21, 1987, a penalty phase hearing was held before the same jury and judge. After hearing evidence in mitigation, the jury unanimously recommended that he be

sentenced to death by electrocution finding also the statutory aggravating circumstance of murder was committed while in the commission of criminal sexual conduct first degree. Judge Fields sentenced Gathers to death in accordance with the jury's decision.

Gathers appealed his sentence and conviction to the South Carolina Supreme Court. After briefing and oral argument, the Supreme Court issued its Opinion on June 6, 1988, affirming the conviction, reversing the death sentence and remanding for a new sentencing hearing. State v. Demetrius Gathers, __S.C.__, 369 S.E.2d 140 (1988).

II. Pertinent Facts from the Trial.

The victim, Richard Haynes, a thirty-two year old black male was a self-proclaimed preacher who referred to himself as "Reverend Minister." At

around 10:00 p.m., on Saturday, September 13, 1986, Mr. Haynes left his parents' house for a walk on a bicycle path in a city park in Charleston, South Carolina. (Tr. p. 564). He carried with him various religious items, including Bibles, rosaries, statues, and various religious tracts such as the "Game Guys Prayer." During the trial, his mother testified that he carried his religious items and talks to people all the time about the Lord. (Tr. p. 563).

On that evening, Mr. Haynes went to a park bench. According to the testimony of Esdavan Hardrick, the Respondent, Demetrius Gathers, along with his confederates, came upon the victim who was changing his clothes and tried to engage him in some conversation. Sitting out on the bench were the Bible and some paper religious tracts. Gathers struck the victim

initially with his fist and the victim fell into another confederate Zandell Hayes and the victim "went wild." Hayes hit the victim and then Gathers and the victim continued tussling up the path on the ground. Haynes was eventually pinned to the ground and kicked and hit by a third confederate Dyonzoria Brown. Brown then picked up a bottle and struck Haynes in the head twice. Then Gathers picked up the bottle and hit the victim about three times in the head with the bottle until it broke while the victim was saying, "Oh, Lord." The victim then fell unconscious and some left. Gathers was still hitting the victim while the others left. Testimony was that he was striking the unconscious victim with an umbrella at this time about his back and head. (Tr. p. 587). According to Hardrick, he saw the victim's pants being down to about his thighs and

Gathers then used the top end of the umbrella and stuck it up the victim's anus while Haynes was groaning. (Tr. pp. 588-589). Hardrick testified that he and Gathers looked through Haynes' belongings, including his bags, looking for something to steal. (Tr. p. 592). When Gathers was going through them, he started throwing things everywhere, while the victim was still on the ground. (Tr. p. 592). As the Supreme Court of South Carolina held, during the altercation, they rummaged through his belongings and found two Bibles and various religious tracts. These articles were introduced into evidence at the guilt phase of the trial without objection.

After Gathers had inserted the umbrella, they left the scene and went to a nearby apartment complex. Gathers showed them a knife. Later they started

to return to the bike path, but Hardrick and Brown did not go. Gathers and Zandell Hayes went back to the victim. Upon returning, Gathers said that he had stabbed the victim. (Tr. p. 598).

The State of South Carolina charged Gathers with murder and sought the death penalty. During the guilt phase of the trial, the victim's mother, Reverend Dorothy Haynes, testified that her son had in his possession on the night of the murder various items including two Bibles, a plastic statue, rosary beads, olive oil, and a card on which was written "The Game Guy's Prayer." (Tr. pp. 565-567). Defense counsel affirmatively noted that he had "no objection" to the evidence being introduced. (Tr. pp. 560-568). Reverend Haynes also testified in the guilt phase that her son had mental problems and had been in and out of the

mental hospital three times in about two years. (Tr. pp. 561-563).

Officer Hazel of the Charleston City Police testified that upon arriving at the scene, he found the Bibles, the angel and personal papers laying to the right next to the body. (Tr. pp. 787-788). No question has ever been raised that the introduction of these items was probative as reflecting Haynes' possessions that the perpetrators reviewed for stealing. See (Tr. pp. 592-593).

The jury convicted Gathers of murder and criminal sexual conduct first degree. In the penalty phase, the state introduced all testimony from the guilt phase without objection from the defense counsel. (Tr. p. 1167). In mitigation, Gathers presented testimony attempting to impeach the forensic pathologist's opinion as to when the anal injury

occurred. (Tr. pp. 1169-1175). Also, Gathers' mother testified for mercy because he was a nice boy and was always helping people and doing things. (Tr. pp. 1182-1183).

The defendant's cousin testified about his family being a single parent family and his sisters' employment and educational status. She testified that his oldest sister Elvira was twenty-three years old living in Detroit and employed by the Highway Department. (Tr. p. 1186). Further, she testified that Ellena lived with her mother and was unemployed but attended a technical education school. Gathers' youngest sister was a fourteen year old high school freshman who also lived with her mother. (Tr. p. 1187). Gathers' brother, Mark Simmons, was thirteen years old. She also testified that the defendant was an affectionate child and

close to her son. (Tr. p. 1187). She claimed that his criminal problems developed from "other people telling Demetrius what to do when his mother told him what not to do. (Tr. p. 1188).

Gathers' sixth grade school teacher testified that Gathers was not one of her brighter students and she had "to force him to get what I want done." (Tr. p. 1191). She described him as an introvert, a follower, who wanted approval as a typical boy. She testified that he did not cause many problems. (Tr. p. 1193). His sister, Ellena, testified about how she felt about her brother. (Tr. pp. 1198-1199). She testified that they had always been close, always been a loving, caring person not to her but to a lot of people. (Tr. p. 1199). She said he had "always been honest with" her and was her "rock." (Tr. p. 1199). Further,

that many days he helped her, "but he has always been there." (Tr. p. 1199). In conclusion, she asked the jury to let him live. (Tr. p. 1199).

The Solicitor then began his closing argument on the law and the mitigating circumstances that the defense presented and told the jury to "look at the individual characteristics of this defendant and the crime." (Tr. p. 1205). The Solicitor described the heinous brutality that occurred on the evening of Mr. Haynes' murder. Particularly, he stated:

> And you will have the exhibits to think about what happened out there. You will have some exhibits in there that will tell you, tell you what your decision must be in this case, although it's not pleasant. We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there. This defendant strew them across the bike path, thinking nothing of that. Among the many cards that Reverend Haynes had among his belongings was this card. It's in

> evidence. Think about it when you go back there. He had his religious items, his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person. Cared little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks.

(Tr. p. 1207, l. 20 - p. 1208, l. 13).

The prosecutor then read the card called "The Game Guy's Prayer" to the jury that was in evidence. He further commented that another item the defendant went through of the victim's was a voter registration card. (Tr. p. 1210). He stated that Haynes believed in his community and that "you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers." (Tr. pp. 1210-1211). The Solicitor concluded that "the proper verdict in this case is death." (Tr. p. 1211).

Defense counsel Sandlin then argued for the jury to continue to "demonstrate your high regard for human life." He urged the jury to remember that "Ricky Haynes is a victim and a victim I don't want you to forget ... [and] the clear implication is that he was a Christian." (Tr. p. 1212, 11. 18-23). Further, he argued for the jury "to think about what the implications of that Christian faith were and are and will be in the future." (Tr. pp. 1212-1213). He urged compassion and mercy and suggested that the question was "where will the pain end? The pain for society, the pain for the victim's family, and the pain for the family of the defendant?" (Tr. p, 1214, 11. 5-8). He concluded that they were only "answerable to God" and "blessed are the merciful," (Tr. p. 1214, 11. 12-14).

After appropriate jury charges, the jury recommended a sentence of death on March 21, 1987. Judge Fields sentenced the defendant to death.

In the appeal to the South Carolina Supreme Court, the sentence of death was reversed on the basis of the prosecutorial comments relying on Booth v. Maryland, supra, because it focused "extensively on the personal characteristics of the victim." In particular, the State Supreme Court stated:

> The solicitor's extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime. Cf. State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987). These remarks conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter. Because the solicitor's remarks violated appellant's eighth amendment rights, we reverse the death sentence.

(App. p. 47).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari and reverse the judgment below because the South Carolina Supreme Court has fundamentally misconstrued this Court's decision in Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and the requirements of the Eighth Amendment as it relates to comments and consideration of a capital murder victim's characteristics. Respondent further respectfully submits that certiorari is compelling and should be granted because Booth, supra, was wrongly decided by the plurality and has recently been strongly criticized by members of this Court in Mills v. Maryland, __U.S.__, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), (Rehnquist, C.J., joined by O'Connor, J., Scalia, J., and Kennedy, J. dissenting), wherein the dissent stated that he did not agree

with Booth or interpret Booth as foreclosing the introduction of all evidence, in whatever form, about a murder victim. Resolution of this conflict is necessary to provide clear guidance to the bench and bar on the limits of the introduction and comment on victim evidence.

I. The Eighth Amendment does not preclude Solicitor's comments on victim characteristics related to a crime.

We submit that the Eighth Amendment does not preclude comment on a victim's character that is directly related to evidence of the circumstances of the crime. Here, the victim was assaulted in a park by a malicious gang while he was inferentially practicing his religion by displaying his religious tracts and statues. The Eighth Amendment does not require a state to redact and neutralize the victim when the properly

admitted evidence reveals victim characteristics such as his religion, his mental or physical deficiencies, or whether the victim had in his possession at the time of the attempted theft a vote registration card. Here, items revealing the above were maliciously scattered around the victim's body by the defendant after he had rejected them as not worthy of theft. Are these items relevant in a capital trial because they reveal particular characteristics of the victim? We submit that they are and to the extent that the plurality Booth v. Maryland, supra, would suggest they are not, the decision is wrong under an appropriate Eighth Amendment analysis.

In a capital murder case, the sentencer "does not attempt to decide whether particular elements have been proved, but instead make a unique,

individualized judgment regarding the punishment that a particular person deserves." Zant v. Stephens, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring). In California v. Ramos, 463 U.S. 992, 1008 (1983), the Court explained:

> In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In facing a penalty, however, there is no similar 'central issue' from which the jury's attention may be divested. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury ..., the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized.

As this Court has consistently held, the factors considered by the capital sentencer must include "the character and record of the individual offender

and the circumstances of the particular offense." Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

What the circumstances of the offense are should include who the victim was, what he was doing when the crime occurred. These factors are related to the Eighth Amendment concept of proportionality that requires "that the penalty imposed in a capital case be proportional to the harm caused and the defendant's blameworthiness." Enmund v. Florida, 458 U.S. 782, 823 (1982) (O'Connor, J. dissenting).

In this proceeding, the comments did not focus on the reputation of the victim and the effect on his family, but the circumstances of the crime over which the defendant had control, the choice of a vulnerable victim. The defendant may choose, or decline to premeditate, to act callously, to attack

a vulnerable victim, to commit a crime while on probation, or to amass a record of offenses. Booth v. Maryland, supra, 107 S.Ct. at 2534, n. 7 (1987). Certainly evidence of the characteristics of a victim that reflect his vulnerability that came from evidence of the offense are appropriate in an Eighth Amendment analysis. Here, the victim's slight build, his open vulnerability by preaching to any person and his mental problems, his location in the park with his religious items, reflect the character of the defendant who made his choice to attack his victim knowing these matters during the attack. This is not the type of evidence of personal qualities of a victim such as standing in the community that the Eighth Amendment was concerned with. This evidence and comment were not sought to be rebutted, but rather were

relied upon by the defense in their closing argument when they asked the jury what the victim and his Christianity would ask them to do concerning taking another's life.

In this case, as reflected by the mitigation evidence, as in all death penalty cases, virtually no limits are placed on the mitigating evidence a defendant may introduce concerning his own history and circumstances, yet the State, under Booth may be precluded from demonstrating similar characteristics, relevant to the crime, and how or why the victim placed himself in a vulnerable position. If a jury is to access the defendant's moral culpability and blameworthiness, one consideration must be information about the murder victim. If this information also reflects the extent of the harm caused by the crime on the family or

society as a whole, it should not be error. Similarly, if a victim was a President or a Mayor whose loss clearly affected society, the fact of this status should not be seen as an Eighth Amendment violation when it is brought to a jury's attention. Clearly, when a defendant, as here, is aware of the personal characteristics at the time of the crime, the time of his selection of the victim, there is no violation. The prosecution is not required under the Eighth Amendment to stand mute when these facts are in the record to assess the defendant's blameworthiness and moral culpability. It speaks of the defendant and the appropriate punishment the law demands.

II. The decision of the South Carolina Supreme Court misconstrued Booth v. Maryland, supra.

The South Carolina Supreme Court held that Booth v. Maryland, supra, was violated because the Solicitor generally commented on evidence presented earlier that the victim was a small, religious person with mental problems who possessed a voter registration card. These comments derived from non-objected guilt phase evidence from his mother about his leaving the house with his religious tracts as a self-proclaimed minister who preaches to everyone and the immediate circumstances of the crime when he was brutally killed while in a park with his religious items laid out on a park bench and his possessions subsequently scattered around him while the perpetrators looked for something to steal. The Solicitor's direct reference in closing argument to this evidence which necessarily revealed information about the victim's and defendant's

characteristics did not violate Booth v. Maryland, supra.

In Booth v. Maryland, supra, the plurality of the Supreme Court stated that the disapproval of statutory victim impact statements does not mean this type of information will never be relevant. "Similar types of information may well be admissible because they relate directly to the circumstances of the crime." Booth, supra, 107 S.Ct. 2529, n. 10. More recently in Mills v. Maryland, supra, the dissent found no Booth violation in introduction of evidence that revealed "a thumbnail sketch of the victim's difficult childhood and frequent encounters with correctional authorities."

Clearly, the information present here was not the same type of information presented on the victim impact statement (VIS) in Booth. There,

the VIS included information from family members on the character and reputation of the victims and their status in the community. The VIS further related the problems the victim's family members were having with the deaths. This is a far cry from the situation here where the information now complained of directly bears upon the crime and its motive.

Here, the fact that the victim was religious was directly connected to a circumstance of the crime -- his apparent study (or preaching) of his religious beliefs when he was accosted. Further, his mental problems directly related to his vulnerability at the hands of the gang of perpetrators that came upon him that night. The voter registration card was another item left after they had scattered his belongings looking for something to steal while the

victim sought peace of mind in the city park.

In Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974), this Court stated that "a court should not lightly infer that a prosecutor intended an ambiguous remark to have its most damaging meaning." Here, the South Carolina Supreme Court's analysis of Booth could be seen to require the prosecutor to sanitize and redact any characteristics of the victim from the case for fear that the evidence could be seen to be arbitrary. If it is correct that whether it is error to comment that a victim was small and religious when he was attacked by four perpetrators after he was apparently practicing his religion, it is a logical next step that comments that a burglary victim lived alone and was elderly and weak would be similarly infirm. The Constitution does

not require that conclusion.

Unlike the "sterling member of the community" comparison decried in Booth that had little nexus with the crime, here the characteristics evolved out of the crime itself. Simply put, it was the state's theory of the case that the motive and reason that Ricky Haynes was assaulted and murdered was because he was a vulnerable and likely victim suffering from some mental disability who was willing to talk to people all the time about the Lord from the park bench until the heinous brutality inflicted by Demetrius Gathers occurred.

The Eleventh Circuit in Brooks v. Kemp, 782 F.2d 1383 (11th Cir. 1985) (en banc), vacated on other grounds in Kemp v. Brooks, __U.S.__, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), stated:

> While argument focusing on the victim can be dangerous, not all prosecutorial references to the victim are improper. The fact that

> there is a victim, and the facts about the victim properly developed during the course of the trial, are not so far outside the realm of 'circumstances of the crime' that mere mention will always be problematic. It is not necessary that the sentencing decision be made in a context in which the victim is a mere abstraction.

762 F.2d 1409. The South Carolina Supreme Court's restrictive reading of Booth requires a new sentencing when there are extensive comments as the victim's character that "were unnecessary to an understanding of the circumstances of the crime." The test in Booth is not whether the victim evidence was "necessary" for an understanding of the crime in light of other evidence, but rather whether "they relate directly to the circumstances of the crime." Booth, supra, 107 S.Ct. 2529, n. 10. The state court's interpretation of Booth is in error and demands vacation.

CONCLUSION

For the reasons stated herein, Petitioners urge this Court to grant the writ of certiorari.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State . . . . . Respondent,

v.

Demetrius Gathers . . . . Appellant.

Appeal from Charleston County
Richard E. Fields, Judge

Opinion No. 22878
Heard March 8, 1988 - Filed June 6, 1988

AFFIRMED IN PART: REVERSED IN PART: AND REMANDED

Assistant Appellate Defender Joseph L. Savitz, of the South Carolina Office of Appellate Defense, of Columbia; and Public Defender Joseph F. Kent, of Charleston for Appellant.

Attorney General T. Travis Medlock, Chief Deputy Attorney General Donald J. Zelenka, both of Columbia; and Solicitor Charles M. Condon, of Charleston, for Respondent.

APPENDIX A

GREGORY, C.J. Appellant was convicted of murder and first degree criminal sexual conduct and sentenced to death. We affirm his convictions, reverse the death sentence, and remand for a new sentencing proceeding.

The victim, Richard Haynes, was a thirty-two-year-old black male. He was a self-proclaimed preacher and called himself "Reverend Minister." Haynes was attacked and killed by four black youths. He was stabbed in the stomach, beaten on the head with a bottle, and his rectum pertorated by an umbrella inser')d in his anus.

One ot the four youths, Steven Hardrick, agreed to testify for the state in exchange for a guilty plea to misprison of a telony. Hardrick testified that he and three others, including appellant, came across the victim late one night at a park bench on a

bicycle path. The victim was changing his clothes. Appellant and the victim exchanged some words and appellant then struck the victim in the face. Another youth, Zandell Hayes, also struck the victim. Appellant pinned the victim to the ground while a third youth, Dee Brown, kicked and beat him. They then smashed a bottle on the victim's head.

When the victim stopped moving, Hardrick nudged him with his foot. Hardrick, Brown, and Hayes then left the scene while appellant remained with the victim. The others looked back and saw appellant beating the victim with an umbrella. Hardrick saw appellant push the umbrella into the victim's anus. Appellant then rejoined the others. Appellant and Hayes, however, returned to the victim once more. Appellant said he stabbed the victim with a knife.

During the altercation, the youths rummaged through the victim's belongings and found two Bibles and various religious articles. These articles were admitted into evidence at the guilt phase ot trial.

Appellant confessed to his involvement in the murder but claimed Brown was the main aggressor.

GUILT PHASE

Appellant complains the solicitor injected an arbitrary factor into the jury's deliberation of guilt by attacking appellant's character when appellant had not put his character in issue. The solicitor stated:

> Let me first stop to point this out. Someone like Demetrius Gathers is not going to be talking about what he did to the minister over here at the Episcopal Church on the corner or the pastor at Morris Brown A.M.E. Church. Who is he going to be talking to: His own ilk. Who is that? Well, you have people out there like Rose Campbell; Jerome Heyward; James,

known as Jeff, Carter. You had a chance to evaluate them. They weren't your sterling citizens that come forward after they heard about all this, but they did testify, and you did have a chance to hear what they had to say.

What do all of them say, to a person? And why would they make this up? They all agree -- again Steven Hardrick has been corroborated -- that this defendant, this defendant along with Zandell Hayes, went back on that track after they left, just as Steven Hardrick told you. It's been corroborated and corroborated again. So it's just not Steven Hardrick's word.

The persons named by the solicitor are those who testified regarding what appellant said he had done to the victim. Appellant argues the solicitor's statements imply appellant is a person of bad character by association. We disagree.

Taken in context, these remarks were not an improper comment on appellant's character. The solicitor's argument concerning the credibility of the State's witnesses is within the

record and its reasonable inferences. State v. Cockerham, ____S.C.____, 365 S.E.2d 22 (1988); State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). We find no error.

Appellant next contends the solicitor improperly disparaged the exercise of his constitutional rights and contrasted those rights with "the trial and execution" of the victim.

The solicitor's comments regarding appellant's rights to a lawyer and to remain silent are in reference to the voluntariness of appellant's confession, a factual issue submitted to the jury and therefore properly argued.

The solicitor also referred to appellant's right to confront witnesses and stated: "Contrast that in your mind's eye with the trial and the execution of Richard Haynes." This single comment does not rise to the

level of prejudice found in State v. Cockerham, supra, where the solicitor's extensive comments constituted reversible error. In the context of the entire record, we hold any error harmless beyond a reasonable doubt. State v. Cockerham, supra; see also State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987).

Next, appellant claims the trial judge should have sua sponte charged the jury on a defense of alibi based on his first pre-arrest statement to police that he was not at the scene at the time of the murder. We disagree.

Appellant first stated he was at Rose Campbell's home at Starcastle Apartments from 9:30 p.m. until 1:00 or 1:30 a.m. the night of the murder. The record indicates the murder occurred between 10:00 to 11:00 p.m. on the bicycle path behind Starcastle Apart-

ments. This pre-arrest statement was introduced into evidence by the State to show appellant changed his story when he later confessed to some involvement in the murder.

Appellant did not raise a defense of alibi at trial. In fact, his lawyer stated at the commencement of trial; "For the record . . . there will be no evidence of alibi." During closing argument, defense counsel further stated: "There is no question that he [appellant] was involved in beating him up."

In light of appellant's disavowal of an alibi defense, it was clearly proper that the trial judge did not charge alibi. Moreover, in view of the overwhelming evidence of appellant's guilt, we hold any error harmless beyond a reasonable doubt. State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985).

Next, appellant complains the trial judge improperly charged the jury on implied malice.

The trial judge charged the jury that malice may be implied from the intentional doing of an unlawful act where no excuse or legal provocation appears. This charge was proper. State v. Crocker, 272 S.C. 344, 251 S.E.2d 764 (1979). Appellant contends, however, the trial judge's charge requiring the jury to determine guilt or innocence "based upon the evidence" impermissibly shifted the burden to appellant to prove an excuse.

This argument is without merit. Nowhere in the charge does the judge mention the need for rebuttal or explanation of the evidence presented by the State. Moreover, the judge's charge comports with the requirement that it is for the jury to determine from all the

evidence whether or not malice is proven. State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986).

Appellant next contends his conviction for first degree criminal sexual conduct should be reversed because of an alleged violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). We disagree.

Pursuant to appellant's request for disclosure of evidence, the State provided an autopsy report prepared by Dr. Conradi. The report stated that the rectal wound was a contributory injury. At her meeting with detense counsel before trial, Dr. Conradi explained the sexual battery occurred "perimortem" or as death was occurring.

Appellant complains the State did not disclose evidence that Dr. Conradi equivocated as to whether the rectal wound was pre- or post-mortem at an

early interview with a co-defendant's counsel. He contends this information would have allowed effective impeachment of Dr. Conradi at trial.

In determining the materiality of nondisclosed evidence, this Court will consider it in the context of the entire record. State v. Osborn, 291 S.C. 265, 353 S.E.2d 276 (1987). The State's failure to disclose information warrants a reversal as a Brady violation only if the omission deprived the defendant of a fair trial. Id.; State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981); see also U.S. v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Appellant effectively cross-examined Dr. Conradi at trial and she conceded she had previously expressed an opinion she was unsure whether the rectal wound was before or after death. She further explained it was now her firm opinion

the wound was pre-mortem. Because appellant has failed to show any prejudice from the alleged nondisclosure, we hold there was no error.

Accordingly, we affirm appellant's convictions for murder and first degree criminal sexual conduct.

SENTENCING PHASE

Appellant contends the solicitor's closing argument at the sentencing phase of trial violated Booth v. Maryland, 482 U.S.____, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), by focusing extensively on the personal characteristics of the victim. We agree.

The solicitor's argument included these remarks:

> We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there. ... Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had his religious items, his

beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers cared little about the fact that he is a religious person. ... But look at Reverend Minister Haynes' prayer. It's called "The Game Guy's Prayer." "Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask you for the stuff to give you 100% of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full on knots and knocks and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me always to play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and to think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of

luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frame-up or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life." Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune. And he took things as they came along. He was prepared to deal with tragedies that he came across in his life.

. . .

Among the personal effects that this defendant could care little about when he went through it is something that we all treasure. It speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card. Reverend Haynes believed in this

> community. He took part. And he believed that in Charleston County, in the United States of America that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers.

In Booth, the United States Supreme Court held the victim's personal characteristics are not proper sentencing considerations in a capital case. 107 S.Ct. at 2535. The Court reasoned there is no justification for permitting a capital sentencing decision "to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." 107 S.Ct. at 2534. Moreover, it would be impossible to provide the defendant "a fair opportunity to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant." 107 S.Ct. at 2535. The Court concluded the injection of the

victim's personal characteristics into the sentencing determination violated the Eighth Amendment.

The solicitor's extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime. Cf. State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987). These remarks conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter. Because the solicitor's remarks violated appellant's eighth amendment rights, we reverse the death sentence. Accord State v. Gaskins, supra (evidence of victim's bad character not admissible as mitigating evidence in sentencing phase).

We need not address appellant's remaining exceptions. Appellant's convictions are affirmed, the death

sentence reversed, and the case is remanded for a new sentencing proceeding.

AFFIRMED IN PART: REVERSED IN PART: AND REMANDED.

HARWELL, CHANDLER, FINNEY, JJ., and Acting Associate Justice J. B. Ness, concur.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,
Petitioner,

versus

DEMETRIUS GATHERS,

Respondent.

AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and forty copies of Petition for Writ of Certiorari to the Supreme Court of the State of South Carolina in the above captioned case by depositing same in the U. S. Mail, first-class postage prepaid, and properly addressed to the Clerk of this Court.

This 5th day of August, 1988.

Donald J. Zelenka

SWORN to before me this
5th day of August, 1988.

_____ (LS)
Notary Public for South Carolina
My Commission Expires: 4-14-97.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,
Petitioner,

versus

DEMETRIUS GATHERS,

Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of South Carolina on the Respondent by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to Joseph L. Savitz, III, Esquire, 1122 Lady Street, Suite 301, Columbia, South Carolina 29201. He further certifies that all parties required to be served have been served.

This 5th day of August, 1988.

Donald J. Zelenka

SWORN to before me this
5th day of August, 1988.

(LS)
Notary Public for South Carolina
My Commission Expires: 4-14-92.

EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. 88-305

STATE OF SOUTH CAROLINA,

Petitioner,

v.

DEMETRIUS GATHERS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM ISAAC DIGGS
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ATTORNEY FOR RESPONDENT.

QUESTIONS PRESENTED

I. Whether the Court should deny the Petition because the South Carolina Supreme Court vacated Respondent's death sentence pursuant to an adequate and independent rule of state law?

II. Whether the Court should deny the Petition because the South Carolina Supreme Court correctly interpreted the Eighth Amendment in vacating Respondent's death sentence?

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IN THE

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October Term, 1988

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Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported as State v. Gathers, ___ S.C. ___, 369 S.E.2d 140 (1988), and is reproduced in Appendix A to the Petition for Writ of Certiorari on Pages 32 through 48.

JURISDICTION

The Court lacks jurisdiction because the South Carolina Supreme Court relied upon state law principles regulating the content of closing arguments in vacating Respondent's death sentence.

CONSTITUTIONAL PROVISIONS INVOLVED

If any constitutional provisions are involved, they are, as Petitioner notes, the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

During the guilt-innocence phase of the trial, various religious artifacts and other items found scattered about the crime scene were introduced into evidence by the prosecution. [Tr. pp. 565-567; Tr. pp. 784-787]. The victim's mother identified these items as her son's and testified to his religious beliefs and history of mental problems. [Tr. pp. 561-563].

In his sentencing phase closing argument, the Solicitor used this evidence as a springboard for speculation about the victim's character and beliefs, with the argument drifting further and further away from evidentiary support, concluding with the advancement of the Solicitor's own ideas about the victim as an adequate justification for the death penalty:

> [Y]ou will have the exhibits to think about what happened out there. You will have some exhibits in there that will tell you, tell you what your decision must be in this case, although it's not pleasant. We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there. This defendant strewn them across the bike path, thinking nothing of that.
>
> Among the man cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had his religious items, his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person. Cared little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks.
>
> But look at Reverend Minister Haynes' prayer. "Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask for the stuff to give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks and trouble, and mae me thankful for them. Help me to be brave so that the harder they come the better I like it. And, of God, help me to always play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, of God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life."
>
> Revered Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune. And he took things as they came along. He was prepared to deal with tragedies that he came across in his life.
>
> And there has been some talk about this being a tragedy. Well let's get one thing straight. This isn't a tragedy. Tragedy is a birth defect, something over which we have no control. This is an atrocity. This was a willful, premeditated act of this defendant, who in Charleston County, on our shores, in this country, took with the most eager pleasure the life of another in the most gruesome, hard to describe and hard to believe circumstances. The appropriate punishment in this case is death.
>
> You will find some other exhibits in this case that tell you more about a just verdict. Again this is not easy. No one takes any pleasure from it, but the proof cries out from the grave in this case. Among the personal effects that this defendant could care little about when he went through it is something that we all treasure. Speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card.
>
> Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public part and sit on a public bench and not be attacked by

> the likes of Demetrius Gathers. Weigh the aggravating circumstances in this case. Look at it very carefully. Calmly, rationally.
>
> Reverend Haynes believed that he could come onto our public parks and sit and be protected, that the law protected him. That Demetrius Gathers would not reign supreme on that public bench. And he doesn't reign supreme. The law in this case protects Reverend Minister Haynes. The proper verdict, the only verdict in this case, is death. Thank you.

[Tr. pp. 1207-1211].

The victim and Respondent were complete strangers. [Tr. 579]. The South Carolina Supreme Court vacated the death sentence because the victim's character was "unnecessary to an understanding of the circumstances of the crime" and the closing argument "conveyed the suggestion [Respondent] deserved a death sentence because the victim was a religious man and a registered voter." 369 S.E.2d at 144.

ARGUMENT I

The Court should not grant the Petition because the South Carolina Supreme Court vacated Respondent's death sentence pursuant to an adequate and independent rule of state law.

The South Carolina Supreme Court has ruled as a matter of state law that the victim's character, where unrelated to the circumstances of the crime, is irrelevant and prejudicial to the jury's assessment of an appropriate sentence in a capital trial. State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132, cert. den., 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 266 (1985). This prohibition applies to references to character contained in the arguments of counsel. State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987); State v. Bell, 223 S.C. 291, 360 S.E.2d 706 (1987); State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976).

That the Court established this rule apart from Eighth Amendment considerations is apparent from its application in Reed and from the treatment of Gaskins and Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), in State v. Bell, supra. In Reed, the Court vacated a death sentence because the Solicitor had described the victim as a "beloved man in the community who was hardworking and had performed numerous acts of fairness and kindness;" citing Bell, the Court identified its condemnation of this argument as the specific application of "elementary" state-law principles: the final argument in the penalty phase of a capital trial must be "carefully tailored so as not to appeal to the personal bias of a juror, nor calculated to arouse his passion or prejudice," and it must be "confined to the record and its reasonable inferences and must focus on the characteristics of the defendant and the nature of the crime." 362 S.E.2d at 16.

In Bell, the defendant claimed that the Solicitor had impermissibly compared his "social worth" with that of his victim. 360 S.E.2d at 712. The Court proceeded to analyze the argument under two rules of clearly independent origin, the state-law rule addressed in Gaskins and a rule derived from the Court's interpretation of Booth. Although the argument was found to be permissible under both rules, the Court's method of analysis clearly assumes as given that its interpretation of the state-law rule is in no way dependent upon what it perceives as the Eighth Amendment concerns of Booth.

The same analysis informs the Court's decision in the present case. While the Court does indeed find a violation of Booth, subsequent discussion and the references to Gaskins and Bell disclose that the Solicitor's argument was additionally impermissible because of its inflammatory nature and its irrelevance to the issues, a regulation of argument founded upon state law. Perhaps the Court was also

troubled by the lack of adequate evidentiary support for some of the Solicitor's observations.

This Court has no authority to review state court determinations of purely state law, nor may it review federal issues that can have no effect on a state court's judgment. International Longshoremen's Assn., AFL/CIO v. Davis, 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986). In the present case, the Solicitor's closing argument in the sentencing phase of the trial was held to have violated both state law and the Eighth Amendment. But since the state-law rule is not dependent upon Booth or the Eighth Amendment for its efficacy, the South Carolina Supreme Court's decision to vacate Respondent's death sentence rests upon an adequate and independent state-law ground.

ARGUMENT II

The Court should not grant the Petition because the South Carolina Supreme Court correctly interpreted the Eighth Amendment in vacating Respondent's death sentence.

Dissents in Booth v. Maryland, supra, and Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), have questioned the correctness of excluding under the Eighth Amendment evidence of the impact of the victim's death upon his family and upon society as a whole: "I fail to see why the State cannot, if it chooses, include as a sentencing consideration the particularized harm that an individual's murder causes to the rest of society and, in particular, to his family." Booth, 107 S.Ct. at 2540 (White, J., joined by Rehnquist, C. J., O'Connor, J., and Stalia, J., dissenting). However, the continued viability of Booth is not presented by the present case, because the prosecution did not seek to introduce impact evidence or argue it as justification for a sentence of death. On the other hand, this is also not a case where, as incorrectly

represented by Petitioner, "the victim's slight build, his open vulnerability by preaching to any person and his mental problems, his location in the park with his religious items, reflect the character of the defendant who made his choice to attack his victim knowing these matters during the attack." [Petition for Writ of Certiorari, page 22]. What the record reflects is that Respondent and his co-defendants selected a person they did not know randomly in the dark of the night. [Tr. pp. 579-581; Tr. pp. 889-893]. Contrary to the Petitioner's claims, the South Carolina Supreme Court did not interpret Booth to prohibit any reference to the victim's character during sentencing, holding only that it could not be argued as justification for a sentence of death where it did not relate to the defendant's character or circumstances of the crime. Cf., State v. Bell, supra, and State v. Reed, supra. The Court's problem with the argument was no doubt compounded by the fact that several of the Solicitor's claims were not supported by the evidence or its reasonable inferences.

Regardless of references to Booth in the opinion, the Court merely applied settled Eighth Amendment principles to the closing argument. The Eighth Amendment requires the jury in the sentencing phase of a capital trial make an "individualized determination" of whether the defendant in question should be executed, based on "the character of the individual and the circumstances of the crime." Zant v. Stevens, 462 U.S. 862, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235 (1983) (emphasis in original); see, also, Eddings v. Oklahoma, 455 U.S. 105, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

To be sure, evidence that the victim's character served as the basis for his selection by his killer could reflect the defendant's character and the circumstances of the crime. Standing alone, however, the victim's character sheds no light on either of these concerns.

That the South Carolina Supreme Court understands this distinction and has not (as Petitioner erroneously

claims) "fundamentally misconstrued" Booth is readily apparent from the present case and from a comparison of Reed and Bell. [Petition for Writ of Certiorari, page 17]. In Reed, the fact that the victim was a "beloved man in the community who was hardworking and had performed numerous acts of kindness," 362 S.E.2d at 16, was correctly perceived by the Court as irrelevant to the question of whether or not the defendant deserved death or life, as the victim's character revealed nothing about the defendant or the circumstances of the crime. In Bell, the Court permitted testimony about the victim's "moderately affluent lifestyle and her plans for the future," 360 S.E.2d at 712, finding that these facts were "critical for the jury's understanding of why [she] was in the various places she was on the day of her abduction." Id.

In the present case, like Reed, there was no evidence of a nexus established between the character of the victim and the defendant's character or the circumstances of the crime, that is, the former does not help to understand the latter. The Solicitor's argument was correctly found to be impermissible under the Eighth Amendment, not specifically the Court's interpretation of Booth. That Amendment compels this result with or without recourse to Booth.

CONCLUSION

Because the opinion of the South Carolina Supreme Court in this case rested upon an adequate and independent rule of state law and the Court correctly interpreted and applied the Eighth Amendment, the Petition should be denied.

Respectfully submitted,

WILLIAM ISAAC DIGGS
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of Appellate Defense
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ATTORNEY FOR RESPONDENT.

September 19, 1988.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. 88-305

STATE OF SOUTH CAROLINA,

PETITIONER,

v.

DEMETRIUS GATHERS,

RESPONDENT.

A P P E N D I X

PAGES A-1 THROUGH A-135

DOROTHY LOUISE HAYNES, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CONDON:

Q. Hi, Mrs. Haynes. Where do you live, please, ma'am?

A. I live in Ardmore, 1514 Balsam Street, in Charleston.

Q. How long have you lived there?

A. Eight years.

Q. Eight years. And you live there with your husband, Jesse Haynes?

A. Yes.
Q. How long have y'all been married?
A. Forty years
Q. How many children did you have?
A. Seven.
Q. And what number child was Ricky Haynes?
A. Fourth.
Q. He was your fourth child?
A. (Nodding affirmatively)
Q. And he went to high school at Middleton, I believe?
A. Wallace and Middleton.
Q. Middleton. And where did he live in September of last year?
A. He lived in the north area on John Street.
Q. How long had he lived there?
A. Almost approximately three months.
Q. Three months?
A. Uh-huh.
Q. And as I understand it he had some odd jobs in September?
A. Yes.
Q. Didn't have regular employment?
A. No.
Q. And he had some mental problems, didn't he?
A. Yes.

Q. And he had been in and out of our mental hospital a few times?
A. Three times.
Q. Three times. When his troubles began -- when did his mental troubles begin?
A. Approximately about two years.
Q. About two years ago?
A. Yes, uh huh.
Q. But you never had any problems with him in terms of violence, did you?
A. No.
Q. And he -- directing your attention to September of last year, on that Saturday night.
A. Yes.
Q. You saw him that Saturday, didn't you?
A. Yes.
Q. What time did he come to your home?
A. He came to my house about twenty minutes to nine.
Q. Twenty minutes to nine?
A. Uh huh.
Q. And did he have anything with him when he came to visit you?
A. Yes, he had a bag, and he set it down in the...
Q. Now you called him Ricky, didn't you?
A. Ricky, yes.

Q. And he was a religious person, wasn't he?
A. Yes, he was.
Q. Tell us about that.
A. He got saved about three years ago, before he got really in this mental problem. And after that he got sort of mentally disturbed -- I am sorry, before that -- and he came to the Lord, and he loved the Lord.
Q. Did he often carry his religious items ---
A. He carry his religious item, his Bible; and he talks to people all the time about the Lord.
Q. He was sort of a preacher, wasn't he?
A. Yes, he was.
Q. And did he give himself a title?
A. Yes.
Q. Called himself Reverend Minister?
A. Right.
Q. But he had no formal religious training, did he?
A. No, not really.
Q. Did he have a church?
A. Yes, he was at my church and also at Bethel Pentecostal Holiness.
Q. Was he married or unmarried?
A. Unmarried.
Q. Did you have any knowledge of him being a homosexual in any way?

A. No, he was not.
Q. And on that night you said he got to your home about twenty minutes to nine?
A. Yes.
Q. How close is your home to the bike pathway?
A. I will say about probably five hundred yards.
Q. Very close?
A. Yes.
Q. Five hundred yards?
A. Yes.
Q. And did he have occasion on that night to leave?
A. Yes.
Q. About what time did he leave?
A. He leave my house about -- it was about 10:15.
Q. At night?
A. Yes, uh huh.
Q. And did he say where he was going?
A. No. I tried to get him to stay, and he said he was going. And ---
Q. Did you have the impression he was coming back or going away?
A. Yes. He told me, said he was going but he wasn't going home, so I thought well he would just go, like he liked to wander around, and come back. That is what he usually does.

Q. Did he take his belongings with him?
A. Yes.
Q. Did he have occasion to refer to money in any way?
A. Well, yes, but he didn't have any that night.
Q. Did you lend him some money?
A. Yes, I give him five dollars.
Q. Was that five single dollar bills or one ---
A. No, it was one five dollars bill.
Q. And, of course, he didn't come back that night?
A. No, he didn't.
Q. And what time were you notified?
A. This was about three o'clock in the morning
Q. Three o'clock? That would be Sunday morning?
A. Yes.
Q. I want to show you a few items here. Your Honor, I believe these would be basically without objection at this point.

MR. KENT: That is true, Your Honor.

BY MR. CONDON:
Q. State's Exhibit Number 7?
A. Yes.
Q. Is that ---
A. All both.
Q. And State's Exhibit Number 10?
A. Yes.

Q. These are Ricky's Bibles?
A. Yes.

MR. CONDON: Your Honor, I want to move these into evidence at this time.

THE COURT: Admitted without objection, appropriately marked, State's exhibit.

(Thereupon, the items previously marked as State's Exhibits 7 and 10 were received into evidence.)

BY MR. CONDON:
Q. And, Mrs. Haynes, State's Exhibit Number 8, do you recognize that?
A. Yes. That is olive oil, what he used to annoint people and pray for them.
Q. Used to annoint people and pray for them?
A. Yes.
Q. That is what Reverend Minister Haynes had?
A. Yes.
Q. He carried that with him?
A. Yes.
Q. And State's Exhibit Number 9, which appears to be a sheet? Do you recognize that, Mrs. Haynes?
A. That is his.
Q. That is Ricky's sheet?
A. Yes.
Q. And he carried this with him on that night?

A. Well I didn't know what he had in the bag, but I know that is his things.
Q. I understand. So you didn't know what he had in the bag when he was leaving ---
A. Right, I didn't know ---
Q. --- but that was a sheet he would normally have?
A. Yes. Yes.

MR. CONDON: Your Honor, I would like to move both of these into evidence.

THE COURT: Admitted without objection, appropriately marked, State's exhibit.

(Thereupon, the items previously marked as State's Exhibits 8 and 9 were received into evidence.)

BY MR. CONDON:
Q. Now, Mrs. Haynes, do you know the defendant, Demetrius Gathers?
A. No, I don't.
Q. And your son was thirty-one years of age ---
A. Yes.
Q. --- when he was killed?
A. Yes.

MR. CONDON: Steven Hardrick.

THE COURT: Just a moment, Mr. Clerk. Are there any persons in this room who are scheduled to be called as witnesses in this case? If so, please stand. (No response) Any persons in this room who are scheduled to be called as a witness? If so, please stand. (No response) Thank you.

MR. KENT: Thank you, Your Honor.

THE COURT: Go ahead, Mr. Clerk.

MR. CONDON: Your Honor, this next witness is Steven Hardrick.

ESDAVAN DUVAL HARDRICK, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CONDON:
Q. Esdavan, they call you Steven, don't they?
A. Yes.
Q. Your other nickname is Nice?
A. Yes.
Q. How old are you?
A. Eighteen.
Q. Eighteen. And before you were arrested what did you do?
A. Well, I went to school.
Q. Where did you go to school?

A. Saint Andrews High.
Q. What grade were you in?
A. Tenth.
Q. Tenth grade. And in this case you were charged with murder and criminal sexual conduct first degree, weren't you?
A. Yes, sir.
Q. What is the deal?
A. Well ---
Q. Speak up.
A. I pled guilty to what I did, was misprision of felony, not reporting what I seen in time; and I pled guilty to my charges under the Youthful Offender Act, hoping that the Judge will sentence me to a Youthful Offender Act.
Q. Hoping, right?
A. Yes, sir.
Q. It's up to the Judge to decide?
A. Yes, sir.
Q. Those other charges -- what charge was that, the other charges?
A. Burglary, the second degree, and grand larceny.
Q. Burglary second degree and grand larceny?
A. Yes, sir.
Q. What did you do?

A. Well we broke into the Ninjitsu Arts, West Ashley.
Q. West Ashley?
A. Uh huh. And when was that? Do you remember when you did that?
A. It was back in June of '86.
Q. You were out on bond when you committed this other crime?
A. Yes, sir.
Q. All right. And that is the deal?
A. Yes, sir.
Q. In exchange for that you are testifying?
A. Yes, sir.
Q. All right. Let's go through your relationships with people here. How about Dyonzoria Brown, also known as Dee Brown? How do you know him?
A. I met him through some friends. I have known him for about a year and a half now.
Q. A year and a half. All right. How about Zandell Hayes?
A. Well we went to school together, middle school and high school. Since the seventh grade.
Q. He is a good friend of yours, isn't he?
A. Yes, he is a pretty good friend.
Q. And this defendant here, Demetrius Gathers, also known as MiMi Gathers, how do you know him?

A. I met him through some friends.
Q. How long have you known him?
A. For about a year and a half.
Q. All right. On -- I want to have you testify about September 13th of last year. That was a Saturday. What time did you get up?
A. About ten.
Q. About ten?
A. (Nodding affirmatively)
Q. And where did you live?
A. 28 Oak Forest Drive.
Q. Where is that?
A. West Ashley.
Q. Who did you live with?
A. My grandmother and my aunt.
Q. Your grandmother and your aunt?
A. (Nodding affirmatively)
Q. What did you do that morning?
A. I stayed around the house and looked at T.V.
Q. What time did you leave your house?
A. It was about three, probably.
Q. Three in the afternoon?
A. Yes.
Q. What did you do then?
A. Well I went to one of my friend's house named Ron.

And then we walked to the bike path where I met up with Demetrius. And then from there we walked down to Magnolia Road. That is where we met up with Zandell Hayes.
Q. So it was you, Demetrius, Zandell and Ron?
A. Ron had left and went home.
Q. What time did he go home?
A. Well I will say it was about five then.
Q. What were y'all doing, just bumming around, or what?
A. Yes.
Q. Were you drinking?
A. No.
Q. And Ron went home about five?
A. Yes.
Q. Tell us about this bike path. Have you been on that bike path before?
A. Yes, sir.
Q. What is it like?
A. Well it's just a long bike path running from Wappoo Road all the way down to Highway 61. You know, people just either walk up down there, walk up or jog or ride their bike.
Q. How far away is that bike path from your home?
A. Not very far. I live almost by Forest Park, and the bike path is right next to Forest Park.

Q. All right. Five or six o'clock what were you doing?
A. By six o'clock, me and Demetrius and Zandell been together, and we walked over to the park, Forest Park.
Q. Where is Forest Park?
A. That is located on Playground Road right next to the bike path.
Q. Right next to the bike path?
A. Uh huh.
Q. What did y'all do there?
A. Well, we sat out on the park for a little while with this other guy, and then from there we walked back down to the bike path.
Q. What time was that?
A. I don't know. It was about 6:30 at this time, I guess.
Q. What were you doing, walking?
A. Yes.
Q. Then what did you do?
A. Well after we got to the bike path we met up with Dyonzoria.
Q. Dyonzoria?
A. Yeah.
Q. Did you also call him Dee Brown or Dondrell Brown?
A. Dee Brown
Q. And what time did you meet up with him?

A. It would have to be about 6:30 or 7:00 then.
Q. Was it dark at this time?
A. No, it wasn't dark.
Q. What did y'all do?
A. Well we walked around for quite some time.
Q. Anybody have a radio?
A. Yeah, I had a radio.
Q. What kind of radio was it?
A. It was kind of a small radio, not very large.
Q. Small radio?
A. (Nodding affirmatively)
Q. Anybody have an umbrella?
A. Yes. Dyonzoria was walking with his umbrella.
Q. Dyonzoria was walking with his umbrella?
A. (Nodding affirmatively)
Q. Steven, I want to hand you what is marked State's Exhibit 6 for identification purposes at this point. Do you recognize this umbrella?
A. Yes, sir.
Q. What umbrella is this?
A. This was the umbrella that Dyonzoria was walking with.
Q. So Dyonzoria, this is his umbrella?
A. Uh huh.
MR. CONDON: Your Honor, I want to move this

into evidence at this time.

THE COURT: Without objection?

MR. KENT: No objection.

THE COURT: Admitted, appropriately marked, State's Exhibit.

(Thereupon, the umbrella previously marked as State's Exhibit 6 was received in evidence.)

BY MR. CONDON:

Q. Okay. Was this seven o'clock?

A. About seven o'clock.

Q. And where did y'all go?

A. Well from there we walked around in Ardmore. We walked over to Sequoia Apartments.

Q. Sequoia Apartments?

A. Uh huh.

Q. What did y'all do there?

A. We talked to some guys there.

Q. How long did that last?

A. About five or ten minutes at the most.

Q. And who was with you?

A. It was me, Dyonzoria, Zandell Hayes and Dezetrius.

Q. Were you drinking at that time?

A. Not at that time.

Q. Any drugs being used?

A. No, sir.

Q. What happened?

A. From there we walked around. Then we went back over to the Majik Market out there by the 20th Century Fox. We was out there for about ten minutes.

Q. You went to the Majik Market by 20th Century Fox?

A. Yes.

Q. What is the 20th Century Fox?

A. That is a club.

Q. Where is that located?

A. On Highway 61.

Q. And the Majik Market is next to it?

A. Yes, sir.

Q. How far away is that spot from the bike path?

A. That is a good deal away from there. I can't say how far, though.

Q. Went by foot?

A. Yes.

Q. What did you do there at the Majik Market and 20th Century Fox?

A. Well we sat out there for a little while, you know. And then from there we went back to the bike path. When we left the bike path we went over to the Beer Barn, which is now called ---

Q. Went where now? To the Beer Barn?

A. Yes.

Q. Where is that located?
A. That's located on Highway 17.
Q. Highway 17? So you went from Highway 61 to Highway 17, the four of you?
A. Yes, sir.
Q. How long did that take you to get there?
A. About twenty minutes or thirty minutes.
Q. You went to the Beer Barn?
A. Yes.
Q. Did you buy beer there?
A. Yes, sir.
Q. What kind of beer did y'all buy?
A. Schaefers.
Q. Schaefer Beer?
A. Uh huh.
Q. How much did you buy?
A. A twelve-pack.
Q. What happened after that?
A. Well from there we went back down to the bike path, where we had met up with Mr. Haynes.
Q. All right. What time, about, did you leave the Beer Barn?
A. At this time it would have to been about eight or nine.
Q. Eight or nine o'clock?

A. (Nodding affirmatively)
Q. Were you drinking beer along the way?
A. Yes.
Q. Who bought the beer?
A. We got someone to buy the beer for us, but Dyonzoria went with him.
Q. Who paid for it?
A. Me and Zandell had some money. We kind of like pitched in together.
Q. How many beers did you drink before you got back to the bike path?
A. About one.
Q. About one? Apiece?
A. Uh huh.
Q. And you say you got up with Ricky Haynes, is that your testimony?
A. Yes.
Q. Do you know Ricky Haynes?
A. No, I do not.
Q. You didn't know him?
A. (Shaking head negatively).
Q. And where was he when you first saw him?
A. He was standing by the bench on the bike path.
Q. Standing by the bench on the bike path?
A. (Nodding affirmatively)

Q. What was he doing?
A. Apparently he was, I believe, changing clothing.
Q. You think he was changing clothing?
A. (Nodding affirmatively)
Q. What did he do after he changed his clothing?
A. He sat back on the bench and ---
MR. KENT: Your Honor, I am going to object to this leading. I don't believe there has been any testimony about what this -- that this man completed anything. This is a leading question.
MR. CONDON: Withdraw it.
BY MR. CONDON:
Q. What was the lighting like? Was it dark or light?
A. It was dark out there.
Q. Dark out there? And when you got near Ricky Haynes, what was he doing?
A. It looked like he was changing clothing to me.
Q. You say it looked like he was changing clothing. Can you explain that, please?
A. Well because it looked like he was pulling up his pants at the time.
Q. Did he pull up his pants?
A. Yes.
Q. After he pulled up his pants what did Ricky Haynes do?

A. He sat back on the bench.
Q. How big was he?
A. Not very big.
Q. Not very big?
A. Huh uh.
Q. When he sat back on the bench what did y'all do?
A. When we came up to him, all of us told him hi, hello. Then we sat down next to him. And we started drinking our beer. We had the radio on at the time. And then Demetrius was talking to the guy, and he said that he didn't want to talk to him at the time.
Q. Who said that?
A. Mr. Haynes.
Q. What was Demetrius saying to him?
A. I don't know. I did not overhear it.
Q. What happened?
A. Well after that I believe Demetrius struck the man with his fist.
Q. You say you believe he did?
A. Well he did.
Q. What did you see?
A. I saw him hit the man with his fist.
Q. Where were you at this time?
A. I was sitting on the other end of the bench.
Q. How long was the bench?

A. Not very long. I guess a little longer than this right here. (Indicating)
Q. About four feet?
A. Yes.
Q. Where was Zandell Hayes?
A. He was standing more or less like on the side of the man.
Q. Where was Dyonzoria Brown?
A. He was sitting like next to me.
Q. Right next to you?
A. Yes.
Q. So two of you are on the bench next to Ricky Haynes?
A. (Nodding affirmatively)
Q. Zandell was behind him?
A. Yes.
Q. And your testimony is Demetrius Gathers struck him in the face with a fist?
A. Yes, sir.
Q. Where did he hit him in his face?
A. I guess about in his mouth.
Q. Excuse me?
A. In his mouth.
Q. What happened?
A. Well he fell back. When he fell back, he fell more

or less into Zandell Hayes. And at that time he went wild.
Q. Who went wild?
A. Mr. Haynes.
Q. What happened?
A. After that, Zandell Hayes had hit the man.
Q. How did Zandell Hayes hit the man?
A. Hit him with his fist.
Q. Where?
A. I believe in his face.
Q. What happened next?
A. Then he kind of like moved up the bike path, and him and Demetrius was fighting.
Q. Who moved up the bike path?
A. Mr. Haynes.
Q. How did he move?
A. They were more or less tussling up the bike path.
Q. Who was tussling?
A. Mr. Haynes and Demetrius.
Q. How far away did they go up the bike path?
A. Not very far up the bike path. Let me see. I can't recall how far it was.
Q. Over ten yards?
A. It could have been about ten yards, yes.
Q. This would have been Demetrius Gathers and Ricky

Haynes tussling?
A. Yes, sir.
Q. Explain that. How were they tussling?
A. Well they were fighting, and Mr. Haynes was backing up, and then they kind of like hooked up together, and they were like rolling on the ground.
Q. What was Zandell Hayes doing?
A. He was over there with me at the time.
Q. What was Dyonzoria Brown doing?
A. He was over there with me at the time.
Q. What happened next?
A. After he had pinned the guy, Mr. Haynes, on the ground, that is when Dyonzoria went over there. And I believe he hit the guy. He hit the guy a couple of times.
Q. How did he hit him?
A. He hit him with his foot and with his fist.
Q. Where did he kick him?
A. In his ribs.
Q. Where did he hit him with his fist?
A. Probably about the same place.
Q. In his ribs?
A. (Nodding affirmatively)
Q. How many blows at that time?
A. I don't know. I couldn't say.

Q. What happened next?
A. Well then after that Dyonzoria had got a bottle, and he struck the guy in the head with the bottle, twice.
Q. How far away were you at this time?
A. I was still by the bench, about ---
Q. You can estimate about ten yards?
A. Ten yards.
Q. What happened next?
A. Then Demetrius had picked up a bottle, and he hit the guy with the bottle until it finally broke, which was about three times.
Q. Same bottle or a different bottle?
A. Same bottle.
Q. Was Ricky Haynes saying anything?
A. I believe he was saying, "Oh, Lord".
Q. You say you believe he was saying "Oh, Lord". What was he saying?
A. That is what it sounded like to me, "Oh, Lord".
Q. How many times did he say that?
A. About twice.
Q. After the bottle was broken over his head what happened?
A. Well I believe he was unconscious down there because he wasn't moving, and that is when I went over to him and kind of like nudged him with my foot to see if he was all

right. At this time me and Mr. Hayes told them let's go. So we walked back into the middle of the path going to Starcastle Apartments, and that is when Dyonzoria had joined up with us. As we were walking through there we could look back and see the bike path and see that Demetrius and the guy -- well Demetrius was still hitting the guy ---

THE COURT: They can't hear you.

THE WITNESS: We were seeing that Demetrius was still hitting the guy.

BY MR. CONDON:

Q. You say that Demetrius was still hitting the guy?

A. Yes.

Q. What about the Starcastle Apartments, where were they?

A. That is right -- like on the side of the bike path. There is some woods between the bike path and the Starcastle Apartments.

Q. You say that Zandell Hayes and Dyonzoria Brown were with you?

A. We were in the middle of the path.

Q. Going to Starcastle?

A. Yes, on our way to Starcastle.

Q. And your testimony is you looked back?

A. Uh huh.

Q. And you saw what?

A. He was still hitting the guy.

Q. Who was?

A. Demetrius.

Q. How was he hitting him?

A. He was hitting him with the umbrella at this time.

Q. Hitting him with the umbrella?

A. Uh huh.

Q. How did he get that umbrella?

A. Well when Dyonzoria had went to the store he left the umbrella with him.

Q. Left it with who?

A. Demetrius.

Q. At the store?

A. Yes.

Q. Which store?

A. The Beer Barn.

Q. So at that point in time Demetrius got the umbrella?

A. Yes.

Q. And you say he was hitting Ricky Haynes with the umbrella?

A. Yes, sir.

Q. What was Ricky Haynes doing when this happened?

A. He wasn't doing nothing. I believe he was unconscious at the time.

Q. Did he have his clothing on?
A. Yes.
Q. Where was he hitting him with the umbrella?
A. Well he was more or less on his stomach, on his face, at the time; and I believe he was hitting him with the handle part -- well he was hitting him with the handle part -- and about in his back and his head. Upper part of his back.
Q. So you say he was hitting him with the handle part, meaning he was using this end?
A. Yes.
Q. How far away were you when you saw this?
A. By this time about twenty yards, in the middle of bike path.
Q. What happened next?
A. Well the guy's pants was like not all the way up. It was like, you know, about to his thighs. And then that is when he had got the umbrella and stuck that up the man's behind.
Q. Who did that?
A. Demetrius.
Q. What end did he use?
A. Used the top end of the umbrella.
Q. You mean the white end?
A. Uh huh.

Q. And did you see Demetrius Gathers pull down or touch the clothing of Ricky Haynes?
A. I can't recall that.
Q. How long, if you can say, did he use this umbrella?
A. About three minutes, I guess. Three minutes at the most, three to five.
THE COURT: Speak a little louder, son. Speak into the microphone.
THE WITNESS: About three to five minutes at the most.
BY MR. CONDON:
Q. Did you hear any noise from Ricky Haynes?
A. I believe he was groaning at the time.
Q. Was it a loud groan or a low groan?
A. A low.
Q. How far away was Ricky Haynes at this point from the park bench?
A. About ten or fifteen yards.
Q. Ten or fifteen yards?
A. (Nodding affirmatively)
Q. What did Demetrius Gathers do after he used this umbrella?
A. After that, you know, we called him and tell him let's go. Then we were walking to the Starcastle Apartments, and after we had got out the path that is

when he ran and rejoined up with us.
Q. He rejoined up with y'all, is that what you are saying?
A. Yes.
Q. Who was with you at this time?
A. It was Dyonsoria, Demetrius, Zandell and myself.
Q. And you went to the Starcastle Apartments?
A. Yes, we did.
Q. Why did you go there?
A. Well we went there to talk to Hodges Campbell.
Q. Who is Hodges Campbell?
A. He is a friend that goes to school with me.
Q. A friend of whom?
A. All of us.
Q. And he lives in Starcastle?
A. Yes, he does.
Q. Did you go to his apartment?
A. Yes, we did.
Q. Who went to the door?
A. Well we didn't have to go to the door because his sister was outside talking with some guy.
Q. Whose sister was outside?
A. Hodges.
Q. What is her name?
A. Rose.

Q. And what was she doing?
A. She was talking to a guy.
Q. Did you know who she was talking to?
A. No, I do not.
Q. What happened?
A. Well we asked for Hodges. At that time I believe she said he wasn't home. So we stayed out there and talked to her for sometime.
Q. Anybody else outside?
A. Well, no. It was just us six.
Q. Anybody else join you?
A. Yes this other dude, Derose, came up. I don't know who he is. He came up, and all of us was out there talking.
Q. Did anybody have blood on their clothing?
A. Yes.
Q. Who did?
A. Well Zandell had blood on his shoes and socks and his shirt. And Demetrius had blood on his shirt. And Dyonsoria had blood on his shoes and shirt.
Q. When you first came upon Ricky Baynes did he have any items out?
A. Yes he had a Bible. And some paper.
Q. What was he doing with that?
A. It was just sitting on the bench.

Q. A Bible?
A. Uh huh.
Q. Did you have occasion to go through any of his belongings?
A. Yes, I did.
Q. What did you do?
A. I looked through the bag, through his bags.
Q. Looking for something to steal?
A. Yes.
Q. Did Demetrius Gathers go through his belongings?
A. Yes, he did.
Q. What did he do?
A. Well when he went through his belongings he started throwing things about, just throwing them everywhere, looking through things.
Q. When did he go through his belongings?
A. Right after I did.
Q. Where was Ricky Haynes when this happened?
A. He was still on the ground.
Q. Anybody touching him?
A. No, not at that time.
Q. And at what point did Demetrius go through his belongings?
A. Well it was like, after I had gone over there and nudged the guy to see if he was all right, at that point.

Q. So before the umbrella?
A. Yes.
Q. How long did it take Demetrius to go through his belongings?
A. Not very long. About a minute at the most.
Q. Then he went back to him with the umbrella?
A. Yes, he did.
Q. And hit him over the head?
A. Yes, sir.
Q. Now when you were at the Starcastle Apartments, did Zandell Hayes have occasion to do anything with a sock?
A. Yes, he did. He took his sock off and burned it.
Q. Why did he do that?
A. Because it had blood on it.
Q. What did he do with his sock?
A. After he burned it he threw it by a fence.
Q. Now a knife, was there a knife there that night?
A. Yes.
Q. And tell us about this knife. How big was it?
A. It was just a regular-size pocket knife about that big at the most. (Indicating)
Q. Who had it?
A. Demetrius.
Q. Where did it come from?
A. Well earlier we had found the knife. It was in a

tool box that they had threw on the ground, and when it came ---

Q. Wait a minute. They had thrown on the ground?

A. Well, Zandell.

Q. Where was it found?

A. In Ardmore.

Q. Well was it stolen from somebody?

A. It was in the back of a truck.

Q. And where was it in the back of the truck?

A. Just sitting in the back.

Q. In somebody's truck?

A. Yes.

Q. Was it parked in someone's home?

A. It was parked like at the end of the driveway.

Q. Who got the knife?

A. Well after he had picked it up and thrown it in the street ---

Q. Who did?

A. Zandell. Demetrius looked through it, and we found the knife in it.

Q. Looked through what?

A. The tools on the ground.

Q. So Zandell picked up a tool box?

A. Yes.

Q. And threw it on the ground?

A. Yes.

Q. And Demetrius went through it?

A. Yes, he did.

Q. When was this done?

A. When we were on our way to Beer Barn to buy the beer.

Q. Who got possession of the knife?

A. Demetrius did.

Q. Where did he keep it?

A. He put it in his pocket.

Q. And when you were at the Starcastle Apartments talking to Rose and others, did you see that knife?

A. Yes.

Q. Tell us about that?

A. Well he had pulled the knife out.

Q. Who did?

A. Demetrius did. And he said that he had forgot about the knife. So at this time we were on our way to the bike path, and Dyonzoria had dropped some cologne. So me and him turned around and went back to Rosemary's house.

Q. Who dropped the cologne?

A. Dyonzoria.

Q. Where did he drop it?

A. It was on the ground, back a couple of feet before Rose's house.

Q. So you are saying all four of you were going back to the bike path? Is that right?
A. Yes.
Q. Why were you going back to the bike path?
A. Well he went back -- we was going back to the bike path -- we were going back there -- I can't really say.
Q. Where did you go?
A. Well after we turned around, me and Dyonzoria, we went back to Rosemary's house.
Q. You and Dyonzoria went back to Rosemary's house?
A. (Nodding affirmatively)
Q. Did you enter that path to go to the bike path?
A. No, we didn't enter it.
Q. You got near it?
A. Yes.
Q. You went back to Rose's house?
A. Yes.
Q. Who had the knife at this time?
A. Dyonz -- Demetrius.
Q. And who went with him back to the bike path?
A. Well, right before we had ran back I believe that Mr. Hayes had already went back there.
Q. Mr. Hayes, who is that?
A. Zandell.
Q. Zandell Hayes. You call him Zan, don't you?

turned around, he came back in about two minutes. And Demetrius was still out there.
Q. When did Demetrius rejoin you?
A. About three to five minutes after we had went back to Rose's house.
Q. You weren't on that bike path a second time, were you?
A. No, I wasn't.
Q. What did Demetrius tell you about what happened on the bike path when he went out there the second time?
A. Well when he had came back he said that he had stabbed the guy.
Q. He told you that?
A. Yes.
Q. What did Zandell Hayes say?
A. He didn't say anything.
Q. Anybody wearing glasses that night?
A. Yes Dyonzoria was wearing glasses.
Q. What kind of glasses were these?
A. Malcolm X.
Q. Malcolm X glasses?
A. (Nodding affirmatively)
Q. Describe those, please.
A. Well they are gold frames, kind of small frames, that kind of tilt forward on your face.

Q. Did Dyonzoria wear those glasses the whole night?
A. No. Dyonzoria had them, Demetrius had them, and Zandell had them.
Q. They were passed around?
A. Yes.
Q. Now before you and the other individuals came upon Ricky Haynes, did you have occasion to go to a white female's house?
A. Yes, we did.
Q. Who went with you?
A. Well at this time it was earlier. It was me, Demetrius and Zandell at this time.
Q. You, Demetrius and Zandell?
A. Yes, it was.
Q. Where was Dyonzoria Brown?
A. He was on the bike path at this time.
Q. About what time was that?
A. About eight.
Q. Where was this white female located?
A. Her house, like, is right next to the bike path.
Q. Right next to the bike path?
A. There is a house in between -- two houses in between her house and the bike path.
Q. Did you know her?
A. Yes, I know her.

Q. What is her name?
A. Maryann.
Q. Maryann. Did you know her last name?
A. No, I don't.
Q. What happened at her house?
A. Demetrius went up to the door. Me and Zandell was sitting on the corner waiting for him.
Q. So y'all sat on the corner?
A. Yes.
Q. Demetrius went up to her house?
A. (Nodding affirmatively)
Q. How long was he at her house?
A. About five minutes.
Q. Did he have your radio, or not?
A. Yes, he had the radio at the time.
Q. Now back at the Starcastle, about what time are we talking about when Demetrius went back with Zandell on the bike path? About what time?
A. About 9:30 or 10:00.
Q. Could it be later?
A. I don't think it was later.
Q. And you say that Demetrius was on that bike path a little bit longer than Zandell?
A. Zandell was out there a little bit longer than he was.

Q. But they were both out there at the same time?
A. Yes.
Q. At one point?
A. At one point.
Q. How long were they out there together?
A. About a minute, two minutes at the most.
Q. After they came back, what did y'all do?
A. Well after that we went from there -- we were leaving. We went from there to Fee McNeal's house.
THE COURT: Who?
MR. CONDON: Fee McNeal, Your Honor.
BY MR. CONDON:
Q. Is he also known as Leon McNeal?
A. Yes.
Q. What about the knife? Who had the knife?
A. Well at this time Demetrius ---
THE COURT: Son, speak into the microphone.
THE WITNESS: Well, at this time Demetrius had gave the knife to Zandell as we were walking ---
BY MR. CONDON:
Q. Why did he give it to Zandell?
A. --- to McNeal's house. When we were going to McNeal's house, Mr. Hayes -- well, Zandell was angry with him because earlier that day McNeal had pulled a gun out on his brother.

Q. McNeal had pulled a gun out on Zandell Hayes' brother?
A. Yes, he did.
Q. Where did Leon McNeal or Fee McNeal live in relation to Starcastle?
A. Like right across the corner from it.
Q. Close by?
A. Yes.
Q. How long did it take you to get to his house?
A. About two minutes at the most.
Q. What happened there?
A. Well, Dyonzoria called him outside, and Zandell and McNeal was talking. They were going to fight, but then all of a sudden Fee McNeal ran in the house.
Q. And Zandell had the knife at that time?
A. Yes, it was in his hand.
Q. What was Demetrius Gathers doing at that time?
A. We were just standing around.
Q. You and Demetrius?
A. All of us.
Q. After Leon McNeal ran away what did y'all do?
A. Well we ran back to the Starcastle Apartments for a brief moment, not even a minute, and from there we went down to Demetrius' house.
Q. Where does Demetrius live?

A. A street over from Dyonzoria. I don't know the street.
Q. Close by?
A. Yes, close by.
Q. What happened at Demetrius Gathers' house?
A. Well he went home and changed shirts.
Q. How did he change shirts?
A. Well he went into the back yard and got a different shirt.
Q. Why did he change his shirt?
A. Because he had blood on his shirt.
Q. What happened after that?
A. Well, after that we went to Dyonzoria's house because he wanted to change.
Q. How far away does Dyonzoria live?
A. He lives a street over from Demetrius.
Q. Did he change his clothing?
A. Yes, he did.
Q. What clothing did he change?
A. He changed his shoes and his pants.
Q. Why?
A. Well his shoes had blood ---

MR. KENT: Objection, Your Honor. Calls for a conclusion.

THE COURT: Sustained.

BY MR. CONDON:
Q. Did he have any blood on his clothing?
A. Yes, his shoes.
Q. Where else?
A. And his shirt.
Q. After he changed his clothing, what happened?
A. Well after that we caught a ride. And ---
Q. You caught a ride?
A. Yes, with Wendell Lee.
Q. With who?
A. Wendell Lee.
Q. Wendell Lee? And where did you catch this ride?
A. Right in front of Dyonzoria's house.
Q. Who is Wendell Lee?
A. He is a guy that went to school with me, a pretty good friend that lives right around the corner from me.
Q. And what was he doing?
A. Him and this other guy was riding around, they said.
Q. What other guy?
A. I can't remember his name.
Q. Did he in fact give you a ride?
A. Yes, he did.
Q. Who got in his car?
A. Well all four of us got in the car.
Q. Where did you go?

A. From there he took Demetrius and Dyonzoria to the 20th Century Fox. He took me and Xandell home.
Q. He took Demetrius and Dyonzoria to 20th Century Fox?
A. Yes.
Q. How far away is 20th Century Fox?
A. It's not very far away.
Q. What is 20th Century Fox?
A. A club.
Q. Did you see Demetrius and Dyonzoria get out of the car?
A. Yes.
Q. Did you see what they did?
A. They walked through the park to go to the club because he didn't let them off right at the club. He let them off at the park, and the club is in front of the park.
Q. And what did you do?
A. Well I went home.
Q. Who was let off first?
A. Xandell.
Q. And Xandell lives near you?
A. It's pretty close to me.
Q. Then you were let off?
A. Yes.
Q. Went to bed?

A. Yes.
Q. And when did you turn yourself in?
A. That Tuesday.
Q. Tuesday?
A. (Nodding affirmatively)
Q. Charged with murder and criminal sexual conduct first?
A. Yes.
Q. You gave a statement, didn't you?
A. Yes, we did.
Q. Yes, you did?
A. I did.
Q. And this statement was given at the City of Charleston Police Department?
A. Yes, it was.
Q. And you were advised of your rights?
A. Yes.
Q. Now you have changed that statement, haven't you?
A. Yes, I have.
Q. When did you change it?
A. About two weeks ago.
Q. About two weeks ago?
A. (Nodding affirmatively)
Q. And your first statement?
A. I gave that in September.

Q. Why did you change it?
A. Because over the time that I have been to County Jail I remember lots of things since I gave the first statement. And at the time that I gave the first statement I was quite confused.
Q. Did you change your statement totally?
A. No.
Q. How much beer did you have to drink that night?
A. Well that night we only had three apiece, but earlier that day -- well it was about three o'clock -- I believe we drunk a quart.
Q. A quart of what?
A. Bull.
Q. Of what?
A. Bull.
Q. Bull. When you say we, who is we?
A. It was me, Demetrius, Zandell and another guy.
Q. Now when you came upon Ricky Haynes, you say you went through his personal belongings?
A. Yes.
Q. Did you see any alcohol?
A. Yes, he had two -- well he was drinking one,and he had another one sitting on the bench, California Coolers, some sort of coolers.
Q. Some sort of wine?

A. Yes.
Q. What happened to that wine?
A. Well one of them someone took.
Q. Someone took? Who took it?
A. I can't recall who took it.
Q. What happened with it?
A. We dranked it.
Q. Where did you drink it?
A. We were out there in front of Starcastle.
Q. In front of Starcastle?
A. Yes.
Q. Did you drink it before or after Demetrius and Zandell went back to the bike path?
A. I believe that was after.
Q. After?
A. (Nodding affirmatively)
Q. Did you enjoy it?
A. It was around between four of us, so not much of us got much.
Q. Answer any questions the defendant may have.
MR. KENT: Approach the bench, Your Honor?
THE COURT: All right.
(Thereupon, Mr. Kent approached the bench and a bench conference was held.)
THE COURT: Mr. Foreman, ladies and gentlemen

of the jury, the Court is going to take just a brief recess in between the direct examination and the cross-examination of this witness. Would you be kind enough to retire to your jury room, please?

(Thereupon, at 11:14 a.m., the trial of this case was then recessed until 11:35 p.m.)

(The following takes place outside the presence of the jury.)

THE COURT: Ready, Mr. Kent?

MR. KENT: Ready, Your Honor.

THE COURT: Ready, Mr. Condon?

MR. CONDON: State's ready, Your Honor.

THE COURT: Bring the jury, please. If they're ready.

(The following takes place within the presence of the jury.)

THE COURT: Mr. Kent.

MR. KENT: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. KENT:

Q. Mr. Hardrick, your real name is Esdavan; is that correct?

A. Yes, it is.

THE COURT: Mr. Hardrick, bring that microphone up a little bit. All right.

BY MR. KENT:

A. How old are you now, son?

A. Eighteen.

Q. How old were you in September of last year?

A. Seventeen.

Q. Were you going to school?

A. Yes, I was.

Q. Where?

A. Saint Andrews High.

Q. You knew Zandell at that time?

A. Yes, I did.

Q. Did he go to high school with you?

A. Yes, he did.

Q. How old is Zandell?

A. He is eighteen.

Q. Was he seventeen in September of last year?

A. Yes, he was.

Q. It's correct, isn't it, that you have known Zandell for five or six years?

A. Yes, it is.

Q. You all are pretty good friends, aren't you?

A. Yes, we are.

Q. Hang around a lot together?

A. No, we don't.

Q. You don't hang around after school and so forth?

A. Every now and then.
Q. Every week?
A. No.
Q. Are you familiar with a little store on Magnolia Road known as Wash's Place?
A. Yes, I am.
Q. Do you go there quite often?
A. Yes, I do.
Q. Zandell does too, don't he?
A. Yes, he does.
Q. Do they sell a lot of beer there?
A. Yes, they do.
Q. You all hang out there a lot, don't you?
A. No, we don't.
Q. Do you just go there to get people to buy beer for you and Zandell?
A. Yes.
Q. Neither one of you are old enough to buy it yourselves, isn't that right?
A. Yes.
Q. Did either you or Zandell buy beer on the night in question here?
A. We put together money.
Q. I mean, did you make the actual purchase?
A. No, we didn't.

Q. Where were you when you made that statement, that second one, a couple weeks ago?
A. In a conference room.
Q. Where?
A. Right here in the back, back there.
Q. Are you referring to a conference room here in the courthouse?
A. Yes, I am.
Q. Did you talk to anybody else on March 5th?
A. My lawyer.
Q. Did you talk to any lawyers with the State?
A. Yes, I did.
Q. Do you remember who they were?
A. Yes, I do.
Q. Who were they?
A. It was Mr. Kent ---
Q. No, I am talking about the day in which you made the second written statement, the one that was taken by Sergeant Gordon?
A. Well the only lawyer I talked to was mine.
Q. Oh, I see. Now before that second written statement was made a couple of weeks ago, you had in fact met with some of the prosecutors, hadn't you?
A. Yes, I have.
Q. Several times?

A. Yes, sir.
Q. Several times during the few weeks right before you made that second written statement?
A. Yes, it was.
Q. Did you know when you went home that Saturday night, when Wendell Lee took you home, did you know that Richard Haynes had been stabbed with a knife?
A. Yes, I did.
Q. Because Zandell told you he had done it?
A. No, I don't. He didn't say that.
Q. You didn't see it?
A. No, I didn t.
Q. You got copies of both these statement you made, both the written statements?
A. I don't have copies.
Q. Were you provided copies?
A. Yes, I was.
Q. You can read?
A. Yes, I can.
Q. You have read them before today?
A. Yes, sir.
Q. Now on Saturday, September 13th, you all in fact -- you and Demetrius and Zandell, the three of you were in a number of other places that you haven't mentioned, isn't that right?

A. Yes, I was.
Q. And you didn't mention them because you didn't think they were important?
A. No, I didn't.
Q. Well you were at the Ashleyville Playground sometime in the late afternoon, isn't that right?
A. Yes, we were.
Q. And you all, with some other fellows, got a ride with a Mr. Simmons ---
A. Yes, it was.
Q. --- to Orleans Gardens?
A. Yes, sir.
Q. And that is a group of apartments in an area behind Citadel Mall?
A. Yes, it is.
Q. And you were there for just a few minutes?
A. Yes.
Q. And Zandell was there because he thought he knew somebody who might have some marijuana, isn't that right?
A. Yes, it is.
Q. But Zandell wasn't able to find the fellow that he knew that had the marijuana, is that right?
A. Right.
THE COURT: Son, take your hand from your mouth.

BY MR. KENT:

Q. You wanted to smoke some marijuana, but it wasn't available, is that it?

A. Yes, it is.

Q. From there this group got a ride to Moska's Pool Hall on Wappoo Road, isn't that right?

A. Yes, it is.

Q. Now did you do any beer drinking there?

A. I didn't.

Q. Who did?

A. Well Dyonzoria, Demetrius, Mr. Hayes.

Q. Mr. Hayes. Now this was all before you ever started out on all this walking back and forth between Ardmore and the Magic Mart, isn't that right?

A. Yes, it is.

Q. Now this Magic Mart you are referring to is the convenience store on Highway 61, just west of Playground Road, isn't that right?

A. Yes, it is.

Q. And isn't it a fact that, when you all go there from this area of the Starcastle Apartment and the bike path, that you all cut through the apartments that are right behind the Magic Mart?

A. Yes, we do.

Q. And in doing so it's just a matter of a few blocks

until you are in the West Oak Forest section; isn't that right?

A. Yes, it is.

Q. And, of course, the West Oak Forest section is right alongside of the Starcastle Apartments, isn't that right?

A. Yes, it is.

Q. And isn't it a fact that there aren't any streets that run from Ardmore over into West Oak Forest? Isn't that right?

A. Yes.

Q. There is a tract of land that runs from Highway 17 back towards Highway 61 that separates those two subdivisions? Is that right?

A. Yes, it is.

Q. Now it is in that tract of land that separates those two areas that this portion of the bike path where the bench and so forth is. That is where it's located, isn't that right?

A. I don't understand you.

Q. Well, as you go out west -- or south as the signs say -- on Highway 17 from town, the first subdivision you come to is West Oak Forest?

A. From Highway 17?

Q. Yes. And talking about the areas that we are concerned with here. Doesn't West Oak Forest come before

Ardmore?
A. Yes, it does.
Q. And between those two areas there is a tract of land that separates them, and there is no road or street that goes between those two places, isn't that right?
A. Yes.
Q. But they are connected by the so-called Bike Path Park, isn't that right?
A. Yes, it is.
Q. It is in this area that the Starcastle Apartments are also located? Yes?
A. Yes, it is.
Q. And the Starcastle Apartments are a series of two-story buildings that are built all in a single file; isn't that right?
A. Yes, it is.
Q. And that tract of land separates the West Oak Forest section from the Ardmore section, right?
A. Yes, it does.
Q. And when you get on the bike path from the short path that leads from the Starcastle parking lot, you are actually moving diagonally between the West Oak Forest section that you all live in and the Ardmore section, isn't that right?
A. Yes.

Q. It's a very short distance, isn't it?
A. Yes, it is.
Q. Now let's go to the Starcastle here for a minute so we can understand that. Starcastle Apartments are all in a row, and that row is perpendicular -- do you know what I am saying? At a right angle to the bike path, more or less?
A. (Nodding affirmatively)
Q. You are indicating yes?
A. Yes.
Q. Sir, the Court Reporter don't pick up nods.
A. Yes.
Q. Now there is a long narrow parking lot that runs the length of the Starcastle?
A. Yes.
Q. And at the end of those buildings nearest the bike path there is a street that goes directly into the West Oak Forest section, isn't that right?
A. Yes.
Q. But as you go on up the parking lot and driveway that runs along the apartments, there is yet another little street or driveway that goes out on Rice Drive in West Oak Forest, isn't that right?
A. Yes, it does.
Q. And very near that driveway is Leon McNeal's house,

right?
A. To the bike -- no, it don't.
Q. Don't it come right up to the bike path right away?
A. Oh, yes, it does end.
Q. It runs from 17, dog legs around on Evergreen and proceeds on to the bike path, isn't that right?
A. Yes, it is.
Q. And it dead ends at both ends.
A. Okay.
Q. Now the area on Sequoia that is right there where it ends at the bike path, that is a very well lit area, isn't it?
A. Yes, it is.
Q. There is a big street light there?
A. Yes, it is.
Q. But this is some distance from the bench, isn't that right?
A. Yes, it is.
Q. As you proceed up the bike path towards West Oak Forest and that bench, behind which is the little path that goes into the Starcastle lot, it gets darker and darker, isn't that right?
A. Yes, it does.
Q. Now at this particular time of year in September of 1986 it was still very green all along that path, isn't

that right?
A. Yes, it was.
Q. All the trees had their leaves. It's very lush and pretty in through there, isn't that right?
A. Yes.
Q. And in fact, as you are going from that light at the end of Sequoia up to the bench, there is a lot on your left -- the Ardmore section -- I mean, pardon me, the West Oak Forest area, that same side on your left as you are going towards the bench, there is a big lot of trees there and underbrush and so forth?
A. Yes, it is.
Q. Until you get to the area directly behind the bench, and there is a stand of quite large trees and lots of underbrush separating the Starcastle parking lot from the bench, right?
A. Yes.
Q. And it's through that area that this little foot path runs?
A. Yes.
Q. And that time of year it's very heavily grown up and green and so forth, isn't that right?
A. Yes, it is.
Q. None of you all had any flashlights that night?
A. No.

Q. Never saw a flashlight that night, did you, while all this was going on?
A. No.
Q. No?
A. No.
Q. Thank you. I believe you stated in one of these statements that you guys generally hang out at this bench?
A. Yes, we do.
Q. Do a lot of drinking there?
A. Yes.
Q. Do a lot cf marijuana there?
A. Yes, we do.
Q. Use any other drugs?
A. No.
Q. How many times that night -- I don't understand this. How many times did you go back and forth from the Starcastle Apartments to the bench area of this bike path?
A. I didn't go back to the bench once I went into Sequoia Apartments -- I mean, Starcastle Apartments.
Q. So you personally never did go back?
A. No, I did not.
Q. Now before you got to the bike path, the four of you, and came upon Mr. Haynes, the last place you had

been was walking on Sequoia Street, isn't that right?
A. No, it isn't.
Q. Before you came upon Mr. Haynes the first time you were coming from the Beer Barn and Sequoia, isn't that right?
A. We were coming from the Beer Barn.
Q. Wouldn't you have come on out Sequoia to the end there to get on the bike path?
A. We didn't come out that end.
Q. Which way did you come out?
A. We walked down Balsam Street.
Q. Okay. Doesn't Balsam run into Sequoia?
A. We didn't walk up far enough to go to Sequoia.
Q. Did you cut through somebody's yard on Balsam?
A. No. There is a bike path that makes a right turn right into Balsam Street.
Q. Right into Balsam Street?
A. Yes, it does.
Q. Well, did you come into Ardmore from the Beer Barn on White Oak Drive?
A. Yes, we did.
Q. Did you walk all the way up to Balsam and make the right-hand turn?
A. Yes, we did.
Q. You walked past Evergreen?

A. Evergreen is a street crossover from Balsam.
Q. And parallel to it, isn't that right?
A. Yes, it is.
Q. Wasn't it while you were walking on Balsam and before you got on the path that Zandell Hayes went into the man's truck and got the tool box out?
A. That was before we went to the Beer Barn.
Q. Zandell was acting kind of wild, wasn't he?
A. Yes, he was.
Q. Zandell went into this stranger's truck, took one of his tool boxes, and walked it down a couple of houses and threw it up in the air and let it crash on the street, isn't that right?
A. Yes, it is.
Q. And he didn't see anything he liked in there because it was nothing but a lot of nuts and bolts and spare parts, but he found a knife, isn't that right?
A. He didn't find the knife.
Q. Isn't it a fact that Zandell stole the tool box?
A. Yes, it is.
Q. Isn't it a fact that Zandell threw it up in the air and crashed it on the street, right under a street light just a few doors down from this man's house where he stole the box?
A. Where he threw it there is no street light.

Q. This truck was located at a house on the corner, wasn't it?
A. Yes, it was.
Q. Corner of Balsam and Locust?
A. Yes, it is.
Q. When he got the tool box didn't he go across Locust, staying on Balsam, just a few doors, and crash the tool box on the street?
A. Yes, it is.
Q. You don't recollect a street light being out there?
A. No, I don't.
Q. All four of you were together?
A. Yes, we were.
Q. Did that bother you?
A. No, it don't.
Q. It didn't bother you that he broke this man's tool box and got his belongings?
A. He didn't take anything from it.
Q. He just took everything first?
A. Yes.
Q. Well did that bother you?
A. No, it didn't.
Q. You are accustomed to that kind of behavior when you are drinking?
A. No, I am not.

Q. You just didn't see anything wrong with it?
A. Well I saw something wrong with it, but it didn't ---
Q. Not enough to bother you?
A. It didn't bother me.
Q. Now was this before or after you all were at the Magic Mart?
A. This was after.
Q. When you were at the Magic Mart isn't it a fact that you bought some beer there too?
A. We didn't buy any beer.
Q. You didn't buy any Lowenbrau there?
A. We didn't buy any beer.
Q. Did you buy any Lowenbrau at all that night?
A. No, we didn't.
Q. After the knife was taken, you go to the Beer Barn, and from the Beer Barn you come back; is that correct?
A. Come back to the bike path.
Q. Isn't it a fact that the last stop y'all made was at Maryann's place before you went to the path?
A. No, it isn't.
Q. Had you already been there?
A. Yes, we were.
Q. When was that? Before or after the Magic Mart?
A. That was before.

Q. On the way to Magic Mart?
A. We were on the way to the bike path at that time.
Q. Now the umbrella belongs to Dee Brown, isn't that right?
A. Yes, it does.
Q. When you all left Moska's Pool Hall, it was just you, Mr. Hayes -- Zandell ---
A. Yes, it was.
Q. --- and Demetrius, isn't that right?
A. Yes, it is.
Q. You don't meet Dee Brown or Dyonzoria Brown until you get into Ardmore Subdivision, isn't that right?
A. Right.
Q. He had the umbrella at that time?
A. No we didn't. Dee Brown was not with us at that time.
Q. Well, when you met him did he have the umbrella?
A. Yes, he did.
Q. And his Malcolm X glasses?
A. Yes.
Q. Dee Brown is something of a dandy or something? What is the -- are there any lenses in these Malcolm X glasses?
A. No, it isn't.
Q. They are just frames, aren't they?

A. Yes, it is.
Q. You have known Dee Brown for some time too, right?
A. Yes.
Q. A year or so?
A. Yes.
Q. Does he always carry these -- was it raining that night?
A. No, it wasn't.
Q. Any chance of rain that night that you remember?
A. Not that I remember.
Q. So you come back from the Beer Barn, and you have got just two six packs now?
A. Yes.
Q. There was nothing left from Moska's Pool Hall?
A. No.
Q. Nothing left from earlier in the afternoon?
A. No.
Q. And you come up to this bench, and there is Mr. Haynes?
A. Yes.
Q. And he apparently is changing clothes?
A. Yes.
Q. His trousers are not all the way up?
A. No they weren't. He was on the verge of pulling them up.

Q. So his pants were down. Did he seem embarrassed to you?
A. No.
Q. He sat right down though, once he got them up?
A. Yes, he did.
Q. And you all sat down next to him?
A. Yes.
Q. And you began drinking, is that right?
A. Yes.
Q. How many beers would you say you drank at that point?
A. Two.
Q. And how many would you say -- do you recollect how many Zan Hayes drank at that point?
A. Two.
Q. And Demetrius?
A. Two.
Q. And Dee Brown?
A. Two.
Q. This took some time, didn't it?
A. Yes, it did.
Q. Who owned the radio? Whose radio was that?
A. It was a friend's.
Q. Whose friend?
A. A friend of all of us.

Q. But the friend had given it to -- do you know the guy's name?
A. Shawn.
Q. Shawn had loaned the radio to Demetrius, isn't that right?
A. Yes, it was.
Q. Demetrius had been carrying the radio, isn't that right?
A. He gave it to me, and I was carrying the radio.
Q. All night?
A. We were switching back and forth.
Q. What were you all doing while you are drinking all this beer there at the bench?
A. Listening to the radio.
Q. Did you talk to Mr. Haynes?
A. We told him hello.
Q. Anybody else talk to Mr. Haynes other than that?
A. Well Demetrius was talking to him, and he said that he didn't feel like talking to him.
Q. And there wasn't anything else to it? There was no -- two beers, how long does it take you to take two beers, to drink them?
A. Not very long.
Q. We are talking about twelve ounce cans here, aren't we?

A. Yes, we are.
Q. You never said anything to Mr. Haynes yourself?
A. Just hello.
Q. Were you paying much attention to Demetrius and Mr. Haynes?
A. I wasn't paying attention to their conversation.
Q. Were you talking to Dee Brown?
A. I was talking with Zan at the time.
Q. Well let's go to right when Mr. Haynes, Richard Haynes, is socked, punched the first time. What were you doing at that point in time? Who were you talking with?
A. I was on the bench with the radio at that time.
Q. Right alongside Mr. Haynes?
A. Yes, I was.
Q. Anybody else on the bench with you?
A. Dee Brown.
Q. Were you talking with Dee Brown?
A. We were listening to the radio, talking.
Q. Was Richard Haynes seated between you and Dee Brown?
A. No, he wasn't.
Q. Well who was on the end of the bench? Was Mr. Haynes on an end?
A. Yes, he was.
Q. Who was on the other end?
A. I was.

Q. So Dee Brown was between you and Richard Haynes?
A. Yes, he was.
Q. Are you sure -- as you sat there listening to the radio with Mr. Brown between you and Richard Haynes, are you sure who punched Mr. Haynes first?
A. Yes, I was.
Q. And you were talking to Zan Hayes at the time this happened?
A. I was talking to Dee Brown at the time.
Q. Mr. Haynes goes to the ground with the first punch?
A. When Demetrius had hit him, he fell back into Zandell.
Q. I believe that is one of the points you changed in your statements, is that right?
A. Yes, it was.
Q. And any particular reason you have for changing that?
A. Because at the time that I made the statement I forgot a lot of things, and I was quite confused.
Q. But the second statement you made a couple weeks ago, the man is struck, goes into Zan's arms, and then Zan starts beating on him?
A. Yes, he hits him.
Q. And you stayed on the bench?
A. Yes, I did.

Q. But Dee Brown gets up?
A. Yes, he did.
Q. And he joins into the tussle?
A. Not right then. After Demetrius had already pinned the guy on the ground.
Q. Now did Demetrius pin Richard Haynes on the ground right there by the bench?
A. No, he didn't.
Q. It was on up the path some?
A. Yes, it was.
Q. I believe you have testified about ten yards?
A. Yes.
Q. How many feet in a yard?
A. I can't recall.
Q. You don't know how many feet in a yard?
A. No, I don't.
Q. Well I am standing from you, sir, about the length of this jury box?
A. Yes, you are.
Q. Were they that close or closer?
A. About that distance.
Q. About that distance? Once Demetrius is fighting with Richard Haynes on the ground, that is when Dee Brown gets into it?
A. Yes, he does.

Q. And then he comes over and hits this man with the bottle?
A. He kicked him a couple of times first.
Q. He kicked him first?
A. Uh huh.
Q. Where did he kick him?
A. Along the ribs.
Q. Did the man resist after that? Or do you remember?
A. He was on the ground. He was pinned. He couldn't do anything.
Q. You were also separated from him by thirty or so feet, ten yards?
A. (Nodding affirmatively)
Q. And three men. Isn't that right?
A. Yes.
Q. And Zan, Demetrius and Dee Brown are all around this fellow when this is going on, isn't that correct?
A. Yes, it was.
Q. And you remained on the bench, is that right?
A. Yes, it is.
Q. This didn't bother you, either?
A. It had bothered me, but I couldn't do much about it.
Q. But you stayed right there, is that right?
A. I moved after Dyonzoria had hit the guy in the head with the bottle a couple times, and Demetrius, to check

and see if he was all right.
Q. Was that before or after you went into his belongings?
A. That was right before.
Q. Right before. So you also assured yourself that he was disabled before you went into his bag of belongings, isn't that right?
A. He was unconscious, yes, he was.
Q. You knew that. Is that right?
A. No, I didn't at the time. He was groaning.
Q. This man had two bags of belongings, do you remember?
A. Yes, he did.
Q. Okay. Did you go into either of them while these three fellows are beating on Mr. Haynes?
A. I looked in the bag.
Q. Didn't see anything you liked?
A. No, I didn't.
Q. Now they stop beating him at some point, correct?
A. Yes, they do.
Q. And it's at that point that you say Demetrius Gathers jabbed this man in the behind with the umbrella?
A. Well at the point that he did that I was in the path.
Q. You were in the path?

A. (Nodding affirmatively)
Q. You had already started to go along with -- who, Dee Brown?
A. And Zandell.
Q. And you were a ways into the path?
A. We were like in the middle of the path.
Q. In the middle? Where was this man's body located at that point?
A. About ten yards.
Q. Up away from the bench?
A. Yes.
Q. Did you testify, sir, that Demetrius Gathers probed this man with the tip of this umbrella in his behind for two or three minutes?
A. Well he didn't do that for two or three minutes, but he was beating the man with the umbrella for about that long.
Q. You are saying before he jabbed him with it he struck him over the head for two or three minutes?
A. It took about two or three minutes for him to do all of that.
Q. You stood there and watched?
A. We were in the path.
Q. Back in the path?
A. We had left at one point.

Q. You had already left at one point then?
A. After he had stuck the man with the umbrella.
Q. No, no. I am talking about before that.
A. Huh uh.
Q. My understanding is that you, Zandell and Dee Brown were on your way away from the scene, leaving Demetrius Gathers there; and you are already well into the path, about halfway into the apartments, in the middle of these woods, and you are looking back, in the nighttime, into the dark area of this path, through these woods where there is -- there is no lights at all in the woods, are there?
A. No, there isn't.
Q. And you had no flashlight?
A. No, I didn't. No.
Q. And you watched this from the path for two or three minutes?
A. You can see from the path to where he was laying.
Q. I understand what you are saying. Is it your testimony that you stood there and watched all this up in the path for two or three minutes?
A. Yes.
Q. And you had not at that point, of course, seen the knife out?
A. No.

Q. So you don't know anything about this man being stabbed at that point?
A. No, I don't.
Q. Fact of the matter is you never saw any stabbing with the knife, isn't that right?
A. That's right.
Q. Are you saying that you saw Demetrius stop with the umbrella and then come to you?
A. No.
Q. You all went into the Starcastle parking lot while he was still beating this man with the umbrella?
A. Yes, we were.
Q. So you didn't see the whole thing?
A. No.
Q. Unless, of course, you could see it from the parking lot in the Starcastle Apartments?
A. You can't see it from there.
Q. You can't see it. But you can see it from about halfway in the path?
A. Yes, you can.
Q. Now that's not exactly the way you told it when you made the first written statement to the police, is it?
A. No, it isn't.
Q. When you made the first statement to the police you said Demetrius Gathers jabbed this man in the behind even

before you went over and nudged him with your foot, correct?
A. Correct.
Q. That was the September 16th statement?
A. Yes, it was.
Q. A few hours less than three days after the fact?
A. Yes, it is.
Q. Did you know at that time -- were you sure when you were at the police station and before you ever talked to the police, did you know that this man had been jabbed in the behind with the umbrella?
A. Yes, I did.
Q. Did the police tell you that it had been stuck through his rectum and into his bowels, the peritoneum?
A. No, they didn't
Q. They didn't tell you about that? Did they show you the umbrella?
A. Yes.
Q. They did? ?
A. Not there, then.
Q. Before you made your statement?
A. No.
Q. When you were talking to the police, on September 16th, did you know that Demetrius Gathers had already contacted the police?

A. No, I did not.
Q. You didn't have any idea that Demetrius Gathers had already contacted the police the day before?
A. No, I did not.
Q. You didn't know that Demetrius Gathers had already showed them where Zandell Hayes lived?
A. No, I didn't.
Q. Now the 13th was a Saturday, correct?
A. Yes.
Q. The 14th was Sunday?
A. Yes.
Q. The 15th was Monday?
A. Yes.
Q. And the 16th was Tuesday?
A. Yes.
Q. Monday and Tuesday were school days?
A. Yes, it was.
Q. Did you go to school with Zandell Monday?
A. No, I didn't.
Q. Did you go to school with Zandell Tuesday?
A. Yes, I did.
Q. What did you do on Monday?
A. Monday, I was over at my mother's house in Lenevar, and I couldn't go to school because the school bus don't run over there.

Q. So did you hang out on Monday?
A. I stayed home.
Q. You didn't go to the playground?
A. No, I did not.
Q. You didn't see Zandell Monday?
A. No.
Q. Never?
A. Never.
Q. Tuesday you did?
A. Yes.
Q. At school?
A. Yes.
Q. And you talked about this?
A. We didn't talk about it at school.
Q. Never?
A. Not at school.
Q. Were you contacted by anybody at school ---
A. No, I wasn't.
Q. --- concerning this?
A. No.
Q. Never?
A. (Shaking head negatively).
Q. What about on the bus? Do you ride the same bus?
A. Yes, we do.
Q. Did Mr. Hayes say anything to you about this on the

bus?
A. All he said was that we have to talk, that's all.
Q. He didn't say anything to you about stabbing this man?
A. No, he didn't.
Q. Are you and Zandell in the same classes?
A. No, we are not.
Q. Do they have special education at Saint Andrews High School?
A. Yes, they do.
Q. Are those the classes that Zandell's in?
A. I don't know.
Q. You don't know?
A. (Shaking head negatively).
Q. Do you know if he was in special education before Saint Andrews High School?
A. Well back in middle school we were in the same class, so I couldn't tell you.
Q. Are you afraid of Mr. Hayes?
A. No, I am not.
Q. Has he ever beaten you up?
A. No, he haven't.
Q. Zandell is kind of a wild and crazy guy sometimes, isn't he?
A. Well he likes to crack jokes a lot.

Q. No, I mean physically. He likes to mix it up too, don't he?
A. I've never seen him fight.
Q. You've never seen him fight?
A. No, I haven't.
Q. You have never seen him offer to fight?
A. No, I haven't.
Q. You have never seen him threaten?
A. Yes.
Q. He just threatens? He don't ever get into it? Is that it?
A. I don't know.
Q. Well now, the fact is he went to Leon McNeal's house that night after y'all left the bike path with a knife and said he wanted to cut somebody, isn't that right?
A. He said he wanted to fight McNeal.
Q. And he had the knife?
A. At that time.
Q. Why did you all run away when McNeal ran into the house?
A. Because we thought he would get his gun.
Q. So the four of you get to Rose Campbell's apartment. And there you find her, and she's standing around in the parking lot talking to two or three other men; is that correct? Young fellows?

A. When we left McNeal's house we didn't run back to her house.
Q. No, no, before McNeal. I want to go back to your story here. The four of you had gotten away from the path, and you are at Rose Campbell's, right?
A. Yes.
Q. Now Mr. Hayes is worried that his ankle or leg has been cut, isn't that right?
A. Yes, he was.
Q. In fact, he is looking at it, he is inspecting it, isn't that right?
A. Yes.
Q. And he discovers blood on his sock, isn't that right?
A. Yes.
Q. And he takes his socks off and burns them?
A. Yes
Q. Did you think that odd?
A. It was just -- he said he didn't want to take the bloody sock home.
Q. Now was that before or after he went back to Richard Haynes and was there alone?
A. That was before.
Q. You personally never returned to the body, but Zandell Hayes did, right?

A. Yes, he did.
Q. And Zandell had the knife in his pocket right after that at Leon McNeal's house, right?
A. Yes, he did because Demetrius had ---
Q. And while it was in his pocket, you didn't know where it was, did you?
A. I seen Demetrius give him the knife on the way to Fee McNeal's house.
Q. When did you remember that?
A. When we were walking through the little road that leads right into Rice Drive.
Q. When did you first remember that?
A. I don't understand you.
Q. Today?
A. No.
Q. Isn't it a fact that it's in neither one of these statements that you have made in writing to the Charleston City Police?
A. It is.
Q. It is?
A. It should be in the second one.
Q. You think that you got it completely straight in the second story?
A. Yes, I do.
MR. KENT: Do we have the original of that

statement in the courtroom, the second statement?

MR. CONDON: Are you asking me a question?

MR. KENT: Yes. Your Honor, I would ask that it be shown to this witness so he can inspect it. I would like him to point that out for me.

MR. CONDON: Your Honor, I have no objection to both these statements being offered into evidence.

MR. KENT: I have got a xerox copy here, if I would be permitted to show that to this witness, Your Honor.

THE COURT: Do you want to mark it for identification?

MR. KENT: I am not concerned about introducing it into evidence. I just want to get straight with these stories, Your Honor.

THE COURT: Well, let's mark it for identification if he is going to identify it.

MR. KENT: Pam, would you mark this for identification purposes? Could we use the original instead, Your Honor?

MR. CONDON: It may take some time for us to find it.

THE COURT: You have got a pretty clean copy?

MR. KENT: This one -- Your Honor, this one is clear, yes.

THE COURT: Mr. Solicitor?

MR. CONDON: Your Honor, I believe this copy is pretty clean.

MR. KENT: I hate to give up the only copy I've got.

THE COURT: You can use this.

(Thereupon, the document was marked Defendant's Exhibit 1 for identification purposes only.)

MR. KENT: Would you please ---

THE COURT: Do you want him to identify it?

MR. KENT: Sir?

THE COURT: Do you want him to identify it?

MR. KENT: Yes, please.

BY MR. KENT:

Q. Esdavan, do you recognize the copy that has been given you as being the statement made and signed by you on March 5th, 1987?

A. Yes.

Q. Just to -- let me see if I can help you here, go through it briefly. Right in the beginning you say: In reference to the statement I gave to the City Police on September 16th concerning the murder on the Ardmore bike path, there are additional facts I would like to incorporate into this statement. These changes are -- and then you go on to tell them. Now would you take a

look at that and show me where Demetrius is giving Zandell the knife back?
A. Okay. (Witness reading) I don't see it.
Q. It's not there, is it?
A. No, it isn't.
Q. Well in your first statement, the one back in September, you told the police that Dee Brown had the knife at the apartments, isn't that right?
A. That's right.
Q. Now have you decided that that is just completely wrong?
A. Yes, I have.
Q. Zandell definitely did have the knife on the way to McNeal's right after he had come from the bike path and had been there alone for some time, isn't that correct?
A. Well from the bike path, when Demetrius came back, he had the knife; and he told us that he had stabbed the man. He showed the knife to us.
Q. Mr. Bayes?
A. No, Demetrius.
Q. You did not see the knife?
A. He shown it to us when he said that.
Q. Isn't it a fact that when you all went over to McNeal's you knew that Zandell Bayes intended to fight that man?

A. Yes, I did.
Q. And indeed you knew that Dee Brown -- they had made it up for Dee Brown to go knock on the man's door and ask him out for a beer, isn't that right?
A. I don't know what he asked him for, but he went to the door.
Q. He drew him out of the house?
A. Yes.
Q. And you and Zandell and Demetrius were out of sight, isn't that right?
A. We were in the street.
Q. And McNeal comes on out there?
A. Yes.
Q. And then there is the four of you and him?
A. Yes.
Q. Does Zan pull the knife out in front of Leon McNeal?
A. No. They were talking, and he had the knife closed in his hand.
Q. He already had it out?
A. Yes.
Q. Now McNeal runs away, and you all are afraid that he is going to get his gun?
A. Yes.
Q. And so you scatter?
A. We run, yes.

Q. There is a lot of excitement?
A. Yes.
Q. Isn't that right?
A. Yes.
Q. And everybody runs away?
A. Yes.
Q. And I believe you said that everybody collected back up at the Starcastle Apartments parking lot for just a minute?
A. A brief moment.
Q. Was that the parking lot at the end of the buildings down towards the woods there?
A. No, it wasn't.
Q. It was up towards Rose's?
A. Yes, it was.
Q. And Mr. Hayes was the last one to get there?
A. No, he wasn't. All of us was together.
Q. You were all together?
A. Yes.
Q. Isn't it a fact that Zan was a little bit longer getting there than the rest of you?
A. I believe he was a little bit before the rest of us.
Q. He got there a little before you? Did you go straight there, or did you go up the street towards Highway 61, up Rice towards 61, before you went over to

the Starcastle lot?
A. We ran straight there.
Q. You ran straight there?
A. (Nodding affirmatively)
Q. You think Zandell was first?
A. Uh huh.
Q. Have you seen the knife since then?
A. No, I haven't.
Q. Was the last time you saw it with Mr. Hayes there outside of Leon McNeal's house?
A. Yes, it was.
Q. Has Mr. Hayes never told you what he did with the knife?
A. No.
Q. You never wanted to ask him?
A. No.
Q. You could have asked him at school.
A. Yeah, I could have.
Q. On the bus.
A. (No response).
Q. Isn't that right?
A. Yes, I could have.
Q. And you knew by Tuesday that Richard Haynes or some man had been killed on that bike path, did you not?
A. Yes.

Q. How how did you get to the police station in September? Did they come pick you up?
A. Yes.
Q. Did you want to go? Were you afraid?
A. Yes, I was.
Q. You were very reluctant, weren't you?
A. I don't understand you.
Q. You were scared?
A. Yes.
Q. Of the police, investigation of a murder. It was frightening, wasn't it?
A. Yes, it was.
Q. But you said in your statement of September 16th that you went there of your own free will?
A. Yes, we did.
Q. And, of course, you volunteered to tell everything you told in September also, is that correct?
A. Yes.
Q. Well the police told you, didn't they, that it would be better if you told the truth and that you would not be punished so severely if you told the truth than if you lied, isn't that right?
A. I went down there with the intentions of telling the truth.
Q. Isn't it a fact that the police told you at some

point before you started making all these statements that you would not be punished so badly if you told the truth?
A. Yes, it was.
Q. But in March of this year you decided that the truth was considerably different from what it was in September, isn't that correct?
MR. CONDON: Your Honor, that would be a conclusion. I wouldn't have any objection to both statements being put into evidence and comparing them. But considerably different is a conclusion. He's not qualified ---
THE COURT: He is on cross-examination. I don't --
MR. CONDON: Well, if I can go into it fully then.
THE COURT: Just a second. Let's see if we ---
MR. CONDON: If he wants to go into that ---
THE COURT: Let's talk about it.
(Thereupon, counsel approached the bench, and a bench conference was held.)
THE COURT: Overruled.
BY MR. KENT:
Q. in all this beating around that took place before you -- with all this tussling around, this man was not stabbed, isn't that right?

A. No, he wasn't.
Q. And when you left the bike path with him on it for the first and only time, he was -- Richard Haynes was some thirty or so feet out towards Ardmore from the bench, isn't that correct?
A. About ten yards, yes.
Q. And it was only in March that you remembered that Demetrius Gathers hit this man over the head with the umbrella handle, is that correct?
A. I've had time since I have been in County Jail to remember lots of things.
Q. Since you have been in County Jail you have had an opportunity to talk to the prosecutor several times before your March, 1987, statement also; isn't that right?
A. Yes, it is.
Q. The fact is that when you talked to the prosecutors you would be brought down here to the courthouse, isn't that right?
A. Yes.
Q. How many times would you say you made that trip, sir?
A. About five times.
Q. About five times. You enjoyed getting out of the jail?

A. Yes.
Q. Not much air, and it's kind of uncomfortable in the jail, isn't it, sir?
A. Yes, it is.
Q. You forgot to mention in September that you also went through that man's belongings, isn't that right?
A. Yes, it is.
Q. Were you afraid to tell the truth about that?
A. No, I am not.
Q. You know it was a crime?
A. Yes, I do.
Q. You knew it was a crime in September?
A. Yes, I do.
Q. But in March of 1987 you had already made your deal with the State of South Carolina, is that correct?
A. I didn't make a deal. I just pled guilty to what I did.
Q. Pardon me. I was only using the language of the State. You pled guilty and had certain assurances, isn't that correct?
A. I had no assurances.
Q. You have had the assurance that you won't be sitting in the electric chair or even put in danger of that, isn't that true, sir?
A. I don't feel that I can get put in that as long as I

tell the truth.
Q. Well we know you can't now, Esdavan. We know you can't now. When did you go to court and plead guilty to this misprision of a felony? Do you remember?
A. I can't remember the date.
Q. Does December 17, 1986, sound familiar to you, right before Christmas?
A. Yes.
Q. You talked to your lawyer after that?
A. Yes, I did.
Q. Right?
A. Yes.
Q. Your understanding is that you cannot be further prosecuted in connection with Richard Haynes' death so long as you tell the truth, correct?
A. Yes.
Q. Can you tell me what the State knows from any eyewitness other than what you tell them?
A. I don't understand your question.
Q. The State don't know anything other than what you tell them as an eyewitness, isn't that right?
MR. CONDON: Your Honor, I object to that.
THE COURT: That is argumentative. Ask him the question, he can answer it.
BY MR. KENT:

Q. Now in September you told the police that Dee Brown and Zan Hayes were standing over this man when he, Demetrius, jabbed him in the behind with the umbrella; isn't that right?
A. Yes, I did.
Q. That would have required you to see those two men there, right?
A. Yes, it would have.
Q. That would have required you to call up in your mind's eye a recollection of those two people standing over Demetrius Gathers -- over Richard Haynes, alongside of Demetrius Gathers when he jabbed him with the umbrella; isn't that correct?
A. Yes, it was -- yes, it is.
Q. But in March of this year you say that is not so?
A. No because, as I said before, when I made that statement ---
Q. I know, you are less confused now than you were then.
A. Yes, I am.
Q. In September you said that Dee Brown had the knife in his pocket there at the apartments, isn't that correct?
A. Yes, it is.
Q. Not so in March, isn't that right?

A. No, it isn't.
Q. But you are sure that Zan Hayes returned to Richard Haynes on this bike path and was there alone for some, however brief, period of time; isn't that right?
A. Yes.
Q. You left that out of the September statement, isn't that right?
A. Yes, I did.
Q. Were you aware that Zandell had been brought to the police station to make a statement about the same time you were?
A. Yes.
Q. And you left it out in your September statement that Zandell was there with Richard Haynes on the bike path for some brief period of time, isn't that correct?
A. Yes, it is.
Q. Do you know what the punishment for misprision of a felony is, sir? What's the maximum applicable punishment?
A. I think ten years, sir.
Q. And, of course, you know what the maximum possible punishment is for aggravated murder?
A. Yes, I do.
Q. What is it?
A. The electric chair.

Q. Now in June of last year, before any of this happened, you had been charged -- I believe you described it to some extent to the jury already -- with a first degree burglary, isn't that right?
A. Second.
Q. That is what you pled guilty to.
MR. CONDON: He was charged with second.
BY MR. KENT:
Q. You were charged with second degree all along?
A. Yes.
Q. Do you know what the maximum punishment for that is?
A. Fifteen.
Q. You haven't been sentenced yet?
A. No, I haven't.
Q. Pardon me?
A. No, I haven't.
Q. Isn't it a fact, Esdavan, that you have been assured also of the State's recommendation that you will be sentenced pursuant to the Youthful Offender Act?
A. Hoping that that's what I will get.
Q. Y.O.A., Youthful Offender Act. You have heard that before?
A. Uh huh.
Q. Do you know what is the maximum punishment there?
A. Six years.

Q. Isn't it a fact, sir, that you have been assured that with the time you have served in jail already that you will not see the end of summer, 1987, in jail?
A. I don't know that.
Q. You believe it, don't you?
A. I can't say.
Q. You are hoping, aren't you?
A. I'm hoping.
Q. Be back in school next September?
A. Yes, I will.
Q. Thank you, Esdavan.

REDIRECT EXAMINATION

BY MR. CONDON:

Q. Steven, we have got a written agreement, don't we?
A. Yes, we do.
Q. And the only way you will be prosecuted for anything more than what you have pled guilty to is what? How can that happen?
A. If I don't tell the truth.
Q. And that's what we've told you, to tell the truth.
A. Yes.
Q. If you don't, you will be prosecuted for perjury too?
A. Yes.
Q. Now you have given, in effect, two statements?

A. Yes.
Q. In both of those statements you have always said Demetrius Gathers used the umbrella?
A. Yes.
Q. And you talk about being confused when you go to the police department the first time?
A. Yes.
Q. Well, you were watching out for yourself the first time?
A. Yes.
Q. You didn't tell us about going through the belongings?
A. Yes.
Q. And how did the police get up with you?
A. Well me and Zandell turned ourselves in. We called them and told them to meet us out on Forest Park.
Q. You called the police?
A. Yes.
Q. And we have had several conferences? We have talked about your testimony?
A. Yes.
Q. And you have also talked to Mr. Kent, haven't you?
A. Yes, I have.
Q. You voluntarily talked to him about your testimony?
A. Yes, I have.

Q. And did he ask you about whether or not you would testify that the knife was given from Demetrius Gathers to Zandell Hayes?
A. I don't understand.
Q. Well he asked you -- he questioned you that you might have made this up the first time today?
A. Yes.
Q. About Demetrius giving the knife to Zandell before he went to Fee McNeal's house?
A. Yes.
Q. Did he ask you about that?
A. Yes, he did.
Q. What did you tell him?
A. Tell him that Demetrius had already -- had given Zan the knife on the way to McNeal's house.
Q. You told him that when you met with him?
A. Yes, I did.
Q. That was several days ago?
A. Yes.
Q. Thank you.

MR. KENT: Your Honor, just a few more questions along the lines of the ---

RECROSS EXAMINATION

BY MR. KENT:

Q. Esdavan, neither one of these statements you made to

the police have anything in it about Zan stealing the tool box that this knife came from out of a truck, right?
A. No.
Q. I want you to think carefully before you answer this. When was the first time -- when was the first time anybody from the prosecutor's office asked you about that, the knife coming from a tool box taken from a truck that night?
A. They didn't ask me about it.
Q. When was the first time you told them about it?
A. Today.

THE COURT: What was your answer?

THE WITNESS: Today.

BY MR. KENT:

Q. Before you got on the witness stand?
A. Yes.
Q. Do you remember who it was you were talking to?
A. Yes.
Q. Who?
A. I don't know her name.
Q. This lady right here, Miss Fisher?
A. Yes.
Q. Works for Mr. Condon? Why did you tell her about it? Did she say something about Mr. Barfield and his tool box and knife?

A. She didn't call no name.
Q. Uh huh.
A. She just asked me about it.
Q. What was the sense of the question?
A. She asked me if we had got the knife out of a tool box.
Q. Uh huh. And that is the first time you ever told them about that, isn't that right?
A. Yes.
Q. Well, Esdavan, is there anything else about this case that the State don't know to ask you that you have left out?
A. No.
Q. Isn't it a fact that you didn't tell them about the origin of this knife being a theft out of a car until they knew to say something about it to you?
A. I always told them that we found it.
Q. Now, Esdavan, I know you want to tell us all the truth, but I want you to search your mind before I sit down, and I want you to assure me that you haven't left out any of the truth in this case. Because we know now ---

THE COURT: Don't make a speech, Mr. Kent. Just ask him a question.

BY MR. KENT:

Q. You can see how concerned I am, Esdavan, that you don't leave anything out until its known by the prosecutor?
A. Yes.
Q. Anything else?
A. No, it isn't.
Q. You are sure you never heard Zandell say something along the lines of, "Well, I am going to cut somebody's behind tonight."
A. He say he wanted to fight Fee McNeal.
Q. I am talking about after he had been frustrated in cutting Mr. McNeal. You don't know that he ever said something like that?
A. After?
Q. When he saw he wasn't going to get at Leon McNeal with the knife.
A. We just was planning on going home.
Q. No further questions.

REDIRECT EXAMINATION

Q. Steven, when you met with Mr. Kent voluntarily did he ask you where you got the knife from?
A. No, he didn't.
Q. Thank you. Nothing further.

THE COURT: All right, son, you can come down.

MR. CONDON: Your Honor, we call Mr. Carter.

THE COURT: Mr. Carter.

JAMES L. CARTER, JR., being first duly sworn, testified as follows:

THE COURT: Mr. Carter, do you have some gum?

THE WITNESS: Yes.

THE COURT: Take it out, please.

DIRECT EXAMINATION

BY MR. CONDON:

Q. Mr. Carter, they call you Jeff, don't they?

A. Yes.

Q. James Jeff Carter?

A. Well, that is just a nickname.

Q. Your nickname's Jeff?

A. Right.

Q. How old are you?

A. Seventeen.

Q. Where do you live?

A. 1 Rice Drive, Starcastle Apartments.

Q. At Starcastle Apartments. And do you go to school?

A. Yes, I go to Saint Andrews High School.

Q. Saint Andrews High School. What grade are you in?

A. Eleventh.

Q. All right. Do you know Demetrius Gathers?

A. Yes.

Q. How do you know him?

A. You could say friend, friend-wise, associate, you know. I have seen him around.

Q. Seen him around Starcastle?

A. Yeah.

Q. How about Dyonsoria Brown, also known as Dee Brown?

A. Yeah, I know him pretty well too.

Q. How do you know him?

A. As a friend.

THE COURT: Mr. Carter, speak into the mike, sir.

THE WITNESS: Okay.

BY MR. CONDON:

Q. He is a friend of yours?

A. Yeah.

Q. And Zandell Hayes? Do you know Zandell?

A. Yes, I know him as a friend, too.

Q. How about Steven Hardrick, also known as Nice?

A. He is a friend of mine, also.

Q. So you know everybody?

A. Yeah. Yes, sir.

Q. And you live in Starcastle? Who do you live with?

A. I live with my mother and my stepfather and my two brothers.

Q. And did you know Ricky Haynes?

A. No.

Q. Didn't know him? Now I want to talk about September 13th of last year, which was a Saturday, at nighttime.
A. Okay.
Q. Were you at the Starcastle Apartments?
A. Yes.
Q. What were you doing there?
A. Well I left my apartment, and I went down to Apartment B-6 to Hodges Campbell's apartment to see if he was home. He was home, but he wasn't coming outside. He had looked out the window and said he wasn't coming outside. So his sister came out, and we started talking.
Q. Who is his sister?
A. Rose Campbell.
Q. Okay. What happened?
A. And then after a while Jerome Hampton, I believe, and Todd came, drove up. They didn't come up together, but, you know, they came one by one. And we was out there talking. And I heard some music coming from towards the bike path, and I looked in the woods, Demetrius, Zandell, Dee Brown and Steven coming down.

Demetrius and Zandell didn't have on no shirts. When they came up to us, Dee Brown knocked on the door for Hodges. Hodges looked out the window and said he wasn't coming out. I noticed that all of them had blood on their shoes except Steven, and Dee Brown had blood on

his shirt.

Dee Brown was talking about he was strictly business, he wasn't taking no more mess from anybody. And so, you know, they started telling us about they messing up someone on the track, the bike path which we call the track. And they started telling us, they said something about they was beating him up or something.

Then after while Zandell noticed some blood on his ankle, on his sock; and he started saying he was feeling weak. You know, he -- after, you know, talking about he feeling weak, he thought the man had cut him or something on the ankle, he had said: Come on, MiMi, let's go, you know, mess that -- kill him or something like that. So they went back out ---

THE COURT: Do what now? Repeat that?

THE WITNESS: Zandell had said, "Come on, MiMi, let's go kill him." It wasn't in that, you know, exact word frame; but it was something like that.

BY MR. CONDON:
Q. Who is MiMi?
A. Demetrius. And so they went back out there, and they came back. Zandell had said something like, "Call the EMS," and Demetrius had said he's dead, right? But I didn't take him seriously. I thought, you know, they was fighting someone else, but I didn't never figure it was

that man.

So, you know, they started talking and everything. We was talking. And Zandell started saying something about him wanting to mess up McNeal, Leon McNeal, for something McNeal had did to his brother. So then they walked around to the apartments -- to his house, to McNeal's house. And a little whiles after that they came running back, and I had stopped Steven, and I had asked him what had happened. He said they went up there ---

Q. All right, don't tell me what Steven said.

A. Okay.

Q. Anything said about an umbrella?

A. Well, if I recall, Demetrius had said that he had stuck it up the man's behind.

Q. Who said that?

A. Demetrius.

Q. What did he say exactly?

A. He had said he had struck it up the -- he stuck the umbrella up his behind. And Zan had gathered us around, and he had told us that if anyone asks us anything about this, what they had told us, that we didn't know anything about it. And he had burned his socks after him and Demetrius came back from the track the second time because he said he didn't have no more use for it.

Q. So Zandell burned his socks?

A. Yes.

Q. Did he have blood on the socks?

A. Yes.

Q. You said some of them didn't have their shirts on?

A. Zandell and Demetrius.

Q. Did they have undershirts on?

A. No.

Q. Where was the blood on everyone's clothing?

A. Well three of them, they had blood on their sneakers; and on Dee Brown, he had blood on his shirt, which was a light-colored shirt.

Q. And about what time of night was this?

A. This was around 10:30 or quarter to 11:00, to my knowledge.

Q. Were you drinking anything that night?

A. No, sir.

Q. Using any drugs?

A. No, sir.

Q. Now you have just come forward with this information fairly recently, haven't you?

A. Yes.

Q. How long ago?

A. Probably about two weeks ago.

Q. Why the delay?

A. Well, really I didn't want to have anything to do with this; but, you know, I knew eventually that y'all would come up to me because Rose had told me that she had got a subpoena and that I would be getting one soon about three weeks ago when she first got hers. So, you know, I was kind of prepared for it when y'all came up.
Q. And again, you know Zandell Bayes?
A. Yes.
Q. You are friends with him?
A. Yes.
Q. You know Steven Hardrick?
A. Yes.
Q. Are you friends with him?
A. Yes.
Q. You know Dyonzoria Brown?
A. Yes.
Q. You are friends with him?
A. Yes.
Q. And you know Demetrius Gathers?
A. Yes.
Q. You are friends with him?
A. In a sense.
Q. You have nothing against him, do you?
A. Not really, no.
Q. But you have had some run-ins, haven't you?

A. Yes.
Q. What kind of run-ins?
A. Well at one time somehow he came across some information that my brother, my older brother, and I and two other fellows had wanted to gang him, jump him for some odd reason.
Q. So you have got some ill feelings towards him?
A. Well that is, you know, all in the past, forgive and forget. I sort of forgave, but never forgot.
Q. Now did you see, when they came off of the track -- you call the bike path the track?
A. Yes.
Q. Did you see any alcoholic beverages?
A. Dee Brown had a bottle of Wild Irish Rose in his pants, and Steven had a couple of wine coolers in his hand, with a radio.
Q. A couple of wine coolers?
A. Yes.
Q. With a radio?
A. (Nodding affirmatively)
Q. Did you see an umbrella?
A. No, I do not recall seeing an umbrella.
Q. And how long a period of time were you in their company?
A. Thirty minutes, maybe more. Maybe less. I will say

about twenty-five to thirty minutes.
Q. Then you say they went off to Fee McNeal's house?
A. Yes.
Q. How long before they came back from Fee McNeal's house?
A. Around five to eight minutes they came running back through the apartments.
Q. Five to eight minutes?
A. Yeah.
Q. And how far away does Fee McNeal live from where you were?
A. From where I was?
Q. Right.
A. Couple of yards, maybe. I don't know the exact distance.
Q. And you are certain that Zandell Hayes and Demetrius Gathers went back on that track?
A. Yes.
Q. Did you see a knife?
A. Yes, I seen -- excuse me. I seen Dee Brown with the knife. But I don't know how it got in Zandell's hands. Dee Brown was the only one I seen pulled out the knife.
Q. How do you know it got in Zandell's hands?
A. Because Steven had told me.
Q. All right. That is hearsay. You don't know that.

A. Well.
Q. The only person you saw with a knife that night was ---
A. Dee Brown.
Q. --- Dee Brown?
A. Yes, sir.
Q. How big a knife was it?
A. It was about -- it wasn't too big of a knife. It was a regular pocket-size knife.
Q. Pocket-size?
A. Yes.
Q. Answer any questions the defendant has.

CROSS-EXAMINATION

BY MR. KENT:
Q. Mr. Carter, how long were these four fellows at Rose Campbell's before they went to McNeal's?
A. I will say they was around there for about twenty minutes.
Q. They went to McNeal's, and then they came back; is that correct?
A. Yes. But they didn't stay long.
Q. Was there any other coming and going, Mr. Carter, that you recall by these fellows?
A. Well the only ones was when Demetrius and Zandell went back on the bike path, and when they came running

back through the apartments.
Q. Was that before or after they had gone over to McNeal's?
A. When they went back on the bike path?
Q. Yes, sir.
A. It was after. After they went back on the bike path and came back, they was standing around for a little while, and then they went to McNeal's house.
Q. Okay. Now I tried to take it down the way you said it, and it's not clear to me how sure you are. Neither is it from the statement you made to the police.

MR. CONDON: Your Honor ---

MR. KENT: I want to ask you ---

MR. CONDON: --- he knows this is testifying. I wish he would just follow the rules of evidence.

THE COURT: Yes, sir. Just ask him questions and ---

MR. KENT: I am not testifying. I'm trying to ask this question, Your Honor.

THE COURT: All right, just ask your question.

BY MR. KENT:
Q. I want you to tell me what you mean when you say: If I recall correctly, Demetrius said so and so. What do you mean by that? Do you mean you are having some trouble remembering for sure that Demetrius said it?

A. Yeah.
Q. Isn't it a fact, Mr. Carter, that -- when these fellows first came up to you, you weren't paying any particular attention to what they were talking about; isn't that right?
A. No, that is not. I was paying attention to them. When they first came up I was in front of Hodges and Rose Campbell's door, sitting down up against the brick wall. And then they started talking.
Q. Well I thought you said that -- if I remember. I thought you said that you didn't believe them at first about beating somebody up on the bike path, is that right?
A. I didn't believe them about -- I didn't believe -- I didn't really take them seriously about killing somebody on the bike path. I could imagine that they was fighting because they had blood on themselves.
Q. Dee Brown was quite excited, isn't that right?
A. Yes, he was.
Q. He was doing a lot of talking, wasn't he?
A. Yes. he was.
Q. And a lot of strutting around?
A. Yes.
Q. Would you say that he was pretty cocky out there? He is not going to take any more -- what was the word?

am strictly business now, strictly business? Is that what he said?
A. Yes, he -- yes.
Q. He was saying that over and over again?
A. He said that about two or three times.
Q. Did he say other things like that?
A. I don't remember if he did.
Q. Well in all of this talking between Dee Brown and Zandell Hayes, do you recollect Zan saying something about wanting to whip McNeal that night or cut him?
A. He said he had wanted to mess McNeal up.
Q. Mess him up?
A. Yes.
Q. There were a number of comments made during the course of this -- what did you say, fifteen or twenty minutes before they went to McNeal's?
A. About twenty minutes or so.
Q. Pardon me?
A. About twenty minutes or so.
Q. You can't be sure, Mr. Carter, can you, that Demetrius said that he, personally, Demetrius, had jabbed this man in the behind with the umbrella, can you?
A. I am pretty sure about that. I am sure he said that.
Q. Well when people are talking around out in the

parking lot like that -- you don't know Demetrius from school, do you?
A. No, I don't.
Q. Do you know that he was not going to school?
A. I didn't really know what he was doing, you know, in his spare time.
Q. Well are you positive in these comments that were being made by this group of people that Demetrius was referring to himself when he said -- when he was referring to him sticking -- jabbing this man with the umbrella?
A. Yes.
Q. You are sure he was referring to himself?
A. Yes. He said "I". He started it off with "I".
Q. Was this after Zan had returned from the path when they made the second trip back there?
A. No. It was before.
Q. Are you sure that Dee Brown had a bottle of Wild Irish?
A. Yes.
Q. What is that?
A. Wine.
Q. And Steven Hardrick had a couple of wine coolers?
A. Yes. I would say about two or three.
Q. Thank you.

MICHAEL GORDON, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CONDON:

Q. Sergeant Gordon, what do you do, please, sir?

A. I work for the Charleston Police Department.

Q. What do you do for our police department?

A. I'm currently assigned to the central detective division.

Q. How long have you been with the City of Charleston Police Department?

A. Nine and a half years.

Q. Did you have occasion to come in contact with the defendant, Demetrius Gathers, on Tuesday, September 16th?

A. Yes, I did.

Q. About what time did you see him?

A. I saw him probably a couple minutes before 6:30 in the evening.

Q. Where did you see him?

A. At the City Police Department on Lockwood Boulevard.

Q. And would you just give us a general picture of how

he appeared to you when you first saw him?

A. Yes, sir. He appeared very -- very calm. He was cooperative. Not disorderly at all. He was brought in to the central detective office and then into Lieutenant Roberts' office, where I had my initial contact with him.

Q. When you saw him he was under arrest for the murder of Richard Baynes and the criminal sexual assault of Richard Baynes?

A. Yes, sir.

Q. Did you have occasion at that time to advise him of any rights that he may have?

A. Yes, I did.

Q. Go ahead and read the whole thing.
A. Okay. "This statement of, Name, Demetrius Gathers, is taken before Sergeant Michael Gordon of the Charleston City Police Department, 9-16-86. This statement was begun at 6:40 p.m.

"I, Demetrius Gathers, whose address is 20 Endo Drive, am nineteen years of age and have completed the eleventh grade in school. Sergeant M. Gordon, who has advised me that he is a member of the Charleston City

Police Department and also advised me..." -- then there are the Miranda. Would you like me to go through those again?
Q. Go ahead and skip those. You have already published those.
A. Okay. The narrative begins, "On Saturday, 9-13-86, about 7:30 p.m., I met up with Zandell Hayes on the bicycle track by Forest Park. We then walked back toward Ardmore on the track and we met up with Nice, who is Steven Hardrick. This was up near Starcastle Apartments. From there we three walked back toward Maryville, and from there we went to Orleans Gardens. My cousin Dana drove us.

"We stayed at Orleans Gardens until about 9:20 p.m., and then we went to the pool hall on Wappoo Road. This was me, Zandell, Dana and Steven. Dana dropped us three, Zandell, Steven and myself, off at the pool hall and left. We stayed at the pool hall about twenty-five minutes. Then we left and went to Maryann's house. She lives on Sequoia Drive. We stayed at Maryann's about ten minutes, then we left and started walking on the bike path again.

"When we got back near Starcastle Apartments, we met up with Dee Brown on the path. From there the four of us, Dee Brown, Zandell Hayes, Steven Hardrick and

myself, walked to the Majik Market next to Saint Andrews Gardens and bought four Lowenbrau beers. Dee Brown purchased them. From here we walked back on the path and walked to the Beer Barn on Savannah Highway and bought a twelve-pack of Schaefer beer. We then walked back to Evergreen Street and stopped and talked to a man named Reuben.

"We then went from there back onto the path and walked back to the bench near Starcastle Apartments. At this time a black male was changing clothes on the bench. The black male and Zandell started talking, and Zandell then hit him in the face. At this time Dee Brown started hitting him too. Then I started to hit him also.

"At this time Zandell started choking the black male, and I hit the black male two times in the chest, and he broke away. Dee Brown then grabbed the black male and started choking him. At this time Steven walked over and said, "Let him go." Steven then walked down the pathway toward Starcastle Apartments. I then left also and walked into Starcastle Apartments. Zandell and Dee Brown were still back on the path. About three minutes later they came out.

"About ten minutes later we walked back to the path. It was me, Zandell, Dee Brown. Steven stayed at the apartments. When we got back to the path the black

male was lying on the ground about fifteen feet away from the bench. He was making funny noises. I told Zandell we should call EMS, but he said no. I then poured some beer in the black male's face to try and wake him up. Dondrell then started beating him in the head with the umbrella, and Zandell stopped him.

"At this time me and Zandell picked up the black male and laid him on the bench, and the three of us walked back to the apartments. Then Dondrell, Dee Brown, went back to see whether the man was still alive and found out he was. At this time, Dee Brown and I went to 20th Century Fox Club and later returned to Starcastle Apartments, where my mother came and picked me up."

That was the end of the narrative. And I then asked a series of questions to him, the first being, "Who stabbed the black male on the pathway?" His response was, "Nobody."

The second question, "Who sexually assaulted the black male with the umbrella?" His answer, "I guess Dee Brown did it when he went back out there alone. The umbrella belonged to him. It was brown and beige."

Third question, "Did anyone of you four have a knife that night?" "Not that I recall. Oh, yeah, Dondrell had a knife, but I didn't see him stab anyone."

"Did Steven ever hit or kick or injure this

black male?" His response was, "No."

"Did either of you four take any property from this black male?" His response was, "No."

"Who ransacked the man's property and threw it around?" His response was, "It happened in the scuffle."

Last question, "Is there anything else you wish to tell?" His response was, "No, that's it."

Q. All right, Sergeant. Zandell Hayes, he is now charged with murder and criminal sexual conduct?

A. Yes, sir.

Q. He is awaiting trial?

A. Yes, sir.

THE COURT: Mr. Solicitor.

MR. CONDON: Thank you, Your Honor. Madame Forelady, ladies and gentlemen of the jury, I want to first thank you for your service in this case. I know it has been a real inconvenience on you. On behalf of the Haynes Family, or behalf of the people who have been here, I'm sure on behalf of the defendant himself, we thank you for your close attention.

At this stage of the proceeding your duty at

this point becomes to decide the appropriate punishment for the murder of Richard Allen Haynes. And His Honor will instruct you on the applicable law in South Carolina, and I want to briefly go through that with you, if I might.

You are to weigh, in coming to your decision, the mitigating circumstances -- that is the circumstances that lessen the severity of this murder -- as well as the aggravating circumstances -- that is those circumstances that make it worse. Before a death sentence can be imposed in this state the jury must find beyond a reasonable doubt the existence of an aggravating circumstance. In this case we rely on the aggravating circumstance of criminal sexual conduct in the first degree. You have found him guilty of that beyond a reasonable doubt, and that has in effect been decided although you have to make a further finding at this point, and we rely on that circumstance.

Once that circumstance is found the mitigating circumstances have to be considered. If you do find mitigating circumstances -- and that is circumstances that will lessen the severity of this murder -- the death penalty can still be imposed.

Let's go through the mitigating circumstances

that the defendant relies upon in this case. His Honor will instruct you that one of the mitigating circumstances or a circumstance that they think lessens the severity of this murder is the age or mentality of the defendant. Well the proof has been very clear. He is nineteen years of age. He has family that loves him. No evidence of any mental disease or defect. Knows what is going on. Able to go through school.

Now there has been some talk here of: This is a young man feeling his oats. Or boys, I think that was the term. Well you tell Richard Allen Haynes about these boys out there on that bike path. He knows what he is doing.

They also talk about the lack of the capacity of the defendant to conform his conduct to the requirements of law. He has full capacity to do that. He chooses not to. Look at his record.

They also say the defendant was under the influence of mental or emotional disturbance. The only disturbance that this defendant had on that night was that he was disturbed that he got blood on his shirt and he had to change that before he went to the nightclub.

And they talk about another mitigating or a

circumstance that lessens the severity of this murder is the fact that he doesn't have any prior convictions involving the significant use of violence against other people. Well you can look at his record. He has been through the system. Let's look at the totality of the circumstances in this case. You will have these exhibits. Look at them again.

Oh, and how not to decide this case. His Honor is going to charge you, and of course it only makes common sense, in terms of being comfortable with your verdict and proud of it, I would be the first to say that this is not an easy procedure whatsoever. No one takes any comfort or any pleasure whatsoever in sentencing anyone to die.

It's your responsibility in this case to make this decision. It's not a easy one. But you have all stated under oath in the pretrial part of this trial that if the facts and the circumstances warranted it and the law allowed it you could vote for and sign your name to a docurent calling for the death penalty. This is the case. It's not even close.

And look at the evidence. This defendant, Demetrius Gathers -- and if you were to decide this

case based on sympathy -- and, of course, that is not the way to do it -- but looking at Reverend Minister Haynes and his family and his situation, you would sentence this defendant to death in a minute. But you don't do it that way. You look at the mitigating and aggravating circumstances. You look at the individual characteristics of this defendant and the crime. Let's look at that.

First of all, this is State's Exhibit Number 38, the home of Demetrius Gathers. Middle class home. He has got a roof over his head. Schooling provided to him. Teachers, very impressive teacher. Family members that care for him. No talk here of being forced into stealing for the sake of getting money for food.

Look at that night. This defendant had money. Go looking to buy marijuana. They go and in fact buy alcohol. He has got a home. What does he choose to do? Goes to a nightclub. Has money for a nightclub. Those characteristics. It doesn't stop there, doesn't stop there by any means. You can talk in terms of his prior record. You are aware of those. Family Court. Court of General Sessions. And now he is before you for a most heinous act.

And look in terms of what happened out there on

that bike path. Reverend Minister Richard Allen Haynes was at his parents' home. Dorothy Haynes, Jesse Haynes. And he decides to go for a walk. This defendant, drinking his beer, comes upon him, with others. Reverend Minister Richard Allen Haynes has his Bible out, sitting on a park bench in our county, in our community, at a place where he had every right to be, and he chooses not to talk to this defendant.

What ensued is hard to believe and to describe, but you have heard the testimony. An attack begins that happens in this country, in this community, and while Reverend Minister Haynes begs for mercy -- Lord no, Lord no -- the degradation continues. The circumstances of aggravation in this case are overwhelming.

Under your responsibility, under our law, and weighing the mitigating and aggravating circumstances, the verdict in this case, the decision, must be death.

And you will have this instrument of torture and pain. And when the defendant talks about him being a young man and feeling his oats, not knowing any better, you tell Ricky Allen Haynes, when this instrument was in his private body part, that this

defendant was a young man who didn't know what he was doing.

And as his life fluids seeped out onto our public park, and as he was losing consciousness and with the pain shooting throughout his body, you tell Reverend Minister Richard Allen Haynes that this defendant was feeling his oats, was acting wild and crazy, and this was a high school prank. And it doesn't stop there.

After using that instrument he goes and socializes and goes back. The depravity, the premeditation, the willfulness, the wantonness. An animal would have gotten more mercy. He goes back and with a knife stabs Reverend Minister Haynes in his abdomen. And with little thought, with no thought, as to Reverend Haynes' rights, as to Reverend Haynes' family, goes back and goes to the 20th Century Fox nightclub. Goes to sleep that night. I am sure he slept very peacefully because there was no concern to him of this atrocity.

And you will have the exhibits to think about what happened out there. You will have some exhibits in there that will tell you, tell you what your decision must be in this case, although it's not pleasant. We know from the proof that Reverend

Minister Haynes was a religious person. He had his religious items out there. This defendant strewn them across the bike path, thinking nothing of that.

Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had his religious items, his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person. Cared little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks.

But look at Reverend Minister Haynes' prayer. It's called the Game Guy's Prayer. "Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask for the stuff to give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks

and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me to always play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life."

Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune. And he took things as they came

along. He was prepared to deal with tragedies that he came across in his life.

And there has been some talk about this being a tragedy. Well let's get one thing straight. This isn't a tragedy. Tragedy is a birth defect, something over which we have no control. This is an atrocity. This was a willful, premeditated act of this defendant, who in Charleston County, on our shores, in this country, took with the most eager pleasure the life of another in the most gruesome, hard to describe and hard to believe circumstancer. The appropriate punishment in this case is death.

You will find some other exhibits in this case that tell you more about a just verdict. Again this is not easy. No one takes any pleasure from it, but the proof cries out from the grave in this case. Among the personal effects that this defendant could care little about when he went through it is something that we all treasure. Speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card.

Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit

on a public bench and not be attacked by the likes of Demetrius Gathers. Weigh the aggravating circumstances in this case. Look at it very carefully. Calmly, rationally.

Reverend Haynes believed that he could come onto our public parks and sit and be protected, that the law protected him. That Demetrius Gathers would not reign supreme on that public bench. And he doesn't reign supreme. The law in this case protects Reverend Minister Haynes. The proper verdict, the only verdict in this case, is death. Thank you.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. 88-305

STATE OF SOUTH CAROLINA,

PETITIONER,

V.

DEMETRIUS GATHERS,

RESPONDENT.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 1988, one copy of the Brief in Opposition to Petition for Writ of Certiorari together with one copy of Motion for Leave to Proceed In Forma Pauperis were mailed, postage prepaid, to the below named counsel for the Petitioner. I further certify that all parties required to be served have been so served.

Donald J. Zelenka, Esquire
Assistant Attorney General
Office of Attorney General
State of South Carolina
P. O. Box 11549
Columbia, S. C. 29211



WILLIAM ISAAC DIGGS
Chief Attorney

South Carolina Office
of Appellate Defense
Suite 301, 1122 Lady Street
Columbia, SC 29201
(803) 734-1330

Counsel for Respondent.

SWORN to before me this
19th day of September, 1988.



(L.S.)
Notary Public for South Carolina
My Commission Expires: 1-6-96

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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CLERK

No. 88-305

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

SOUTH CAROLINA,

PETITIONER,

V.

DEMETRIUS GATHERS,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

MOTION TO DISMISS

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COUNSEL FOR RESPONDENT.

*COUNSEL OF RECORD.

Petition for Certiorari Filed August 5, 1988
Certiorari Granted October 11, 1988

Comes now, Demetrius Gathers, by and through his undersigned counsel who would request of this Court a dismissal of the Petition for Writ of Certiorari as a result of a fatal procedural default committed by the State of South Carolina. Petitioner's failure to request the Supreme Court of South Carolina to retain jurisdiction over the matter under state procedural law leaves this Court likewise without jurisdiction to review the judgment.

I. PROCEDURAL HISTORY

A.

On March 20, 1987, Demetrius Gathers was convicted in the Court of General Sessions for Charleston County, South Carolina, for murder and criminal sexual conduct in the first degree. On March 21, 1987, a jury rendered a sentencing verdict of death by electrocution. On June 6, 1988, the Supreme Court of South Carolina affirmed Gathers' convictions but reversed his sentence of death and remanded the case to the Court of General Sessions for Charleston County for a new sentencing proceeding.

B.

Petitioner, State of South Carolina, took no action following the Court's reversal of Gathers' death sentence. No Petition for Rehearing was filed and no request to Stay the Remittitur in the case was made. Consequently, and in

accordance with South Carolina Supreme Court Rule 17 §1, and S. C. Code Ann. §18-9-270, 1976, as amended, on June 17, 1988, the Supreme Court of South Carolina remanded the Remittitur in this case to the Court of General Sessions for Charleston County. (See Exhibit A). On October 27, 1988, Demetrius Gathers filed a Motion for a Speedy Trial with the Clerk of Court of General Sessions for Charleston County, service of which was acknowledged by the solicitor of the Ninth Judicial Circuit for the State of South Carolina. (See Exhibit B).

II. SOUTH CAROLINA'S PROCEDURAL DEFAULT

A.

By failing to request of the Supreme Court of South Carolina a Stay of the Remittitur in this case, Petitioner, State of South Carolina, has committed a procedural default which bars review of this case by this Court. This is so because under long established South Carolina procedural law, the state Supreme Court lost jurisdiction of the matter at the time of the remanding of the Remittitur. Ex parte Dunovant, 16 S.C. 299 (1881); Brooks v. Brooks, 16 S.C. 621 (1882). Moreover, after a Remittitur has been sent down the Supreme Court of South Carolina no longer has the power to order it returned so as to correct errors, Carpenter v. Lewis, 65 S.C. 400, 43 S.E. 881 (1903), because the Supreme Court's control of the judgment ends when the Remittitur has

issued. State v. Adams, 83 S.C. 149, 65 S.E. 220 (1909); State v. Merriman, 35 S.C. 607, 14 S.E. 394 (1891).

B.

While noting that it is important to distinguish between state substantive grounds and state procedural grounds, in Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 564 (1965) this Court held that application of a state procedural rule may bar review by this Court of a state trial proceeding if that procedural rule serves a legitimate state interest. Also see Wainwright v. Sykes, 433 U.S. 72, 108, 97 S.Ct. 2497 (1977) Brennan, J. dissenting; and Michigan v. Tyler, 436 U.S. 499, 513, 98 S.Ct. 1942, 1951 (1978). Indeed, in Henry v. Mississippi, this Court stated that:

> where the state rule is a reasonable one and clearly announced to defendant and counsel, application of the waiver doctrine will yield the same result as that of the adequate non-federal ground doctrine in the vast majority of cases.

379 U.S. at 448, note 3. It is important to note that the legitimate state interest requirement of the application of a state procedural rule was set out in Henry in conjunction with the assertion of a constitutionally protected federal right guaranteed to individuals. The State of South Carolina seeks the vindication of no such right. Thus, under Henry, supra, the legitimate state interest should necessarily warrant a lesser degree of scrutiny, and the State of South Carolina should be held to a higher standard

in its duty to comport its actions with state procedural requirements. Nevertheless, the state Supreme Court's issuance of the remittitur and relinquishment of jurisdiction to the lower court, serves the ultimate interest of appellate review: finality and the orderly administration of the state judiciary itself.

But more importantly, Respondent, Demetrius Gathers himself, has relied on application of the state procedural rule. This can be demonstrated by the fact that there were issues raised in the direct appeal to the Supreme Court of South Carolina which were not addressed by that Court. We would direct the Court's attention to the Petition for Writ of Certiorari at page 47 where Petitioner, State of South Carolina, quotes from the State Court opinion. The opinion states:

> We need not address Appellant's remaining exceptions. Appellant's convictions are affirmed, the death sentence reversed, and the case is remanded for a new sentencing proceeding.

Under South Carolina law, a sentence of death cannot be affirmed by the state Supreme Court absent a ruling on all legal errors in the case. S.C. Code Ann. §16-3-25 (F), 1976, as amended, states

> the sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The Court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

Emphasis Added. Clearly, had Petitioner, State of South Carolina, stayed the proceeding in this case it would have put Respondent Gathers on notice that the State intended to seek further review of the Eighth Amendment claim in this case. As a result of that notice, Gathers could have petitioned the Supreme Court of South Carolina to either clarify its initial decision, or expand the scope of that decision to include the additional legal errors asserted in the appeal which were not reached by the opinion.[1]

C.

The Supreme Court of South Carolina's Order in this case became final on June 6, 1988, the date of its publication. Dept. of Banking, State of Nebraska v. Pink, 317 U.S. 264, 267, 63 S.Ct. 233, (1942). Pink holds that the time for computing when a petition for certiorari is due

[1]Additional errors which arose from the Gathers sentencing proceeding included: (1) a challenge to the adequacy of the lower court's instruction to the jury concerning the finality of the verdict as opposed to being merely an advisory verdict; (2) whether the lower court committed reversible error when it neglected to charge a mitigating circumstance as required by S.C. Code Ann. §16-3-20 (C)(b)(1) to the effect that Gathers was an accomplice in a murder committed by another; and (3) whether the trial court committed reversible error when it instructed the jury that they were not concerned with the issue of guilt or innocence during the sentencing phase of the proceeding and, further, whether the trial judge committed reversible error when it instructed the jury to "weigh" aggravating circumstances against mitigating circumstances in violation of State v. Bellamy, __ S.C. ___, 359 S.E.2d 63 (1987).

runs from the order's date and not from the entering of the judgment on the order in the lower court. Thus, finality as contemplated by 28 U.S.C. 1257(3) is not deferred by the latent power of a state's highest court to reopen the matter and revise its judgment. Market St. Ry. Co., v. Railroad Commission of the State of California, 324 U.S. 548, 551, 65 S.Ct. 770. (1945).

III. CERTIORARI JURISDICTION

A.

In the Market Street case this Court discussed the reason why such a latent power in a state Supreme Court to revise its judgment should not be permitted to defeat the notion of finality.

> Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek our review begins to run.

324 U.S. at 551-52. However, the concept of finality is but one of several conditions precedent which have been established by federal law and which must be satisfied before the exercise of this Court's jurisdiction over a state court judgment.

Statute 28 U.S.C. §1257 requires as conditions precedent finality, prior review by the state's highest court, and inter alia, the claim of a right that is

specially set up under the United States Constitution. Petitioner asserts this Court possesses jurisdiction over the matter under authority of 28 U.S.C. §1257(3). Of course, as allowed by 28 U.S.C. §2101(d) this Court has established as an additional condition precedent to jurisdiction the sixty day filing requirement under Supreme Court Rule 20.1. However, we assert that other conditions precedent exist which must be satisfied before this Court may properly exercise jurisdiction over a state court judgment.

B.

The granting of a Petition for Writ of Certiorari has been held to operate as a stay of lower court proceedings. See Glick v. Ballentine Produce, Inc., 397 F.2d 590 (8th Cir. 1968); United States v. Eisner, 323 F.2d 38 (6th Cir. 1963) construing 28 U.S.C. §2101. However, the mere filing or anticipated action of filing such a Petition does not translate into an automatic stay. Glick, supra, 397 F.2d at 594. Certainly, therefore, Petitioner can claim no right to expect that state court proceedings should be automatically stayed simply because it intended to file timely under 28 U.S.C. §1257(3) and Supreme Court Rule 20.1, nor could it assume that nothing of consequence could occur during the interim period between the issuance of the state court order and the granting of the Petition by this Court. Therefore, it is argued that 28 U.S.C. §2101 creates another jurisdictional condition precedent, if absent its

application, events could transpire which defeat the practical effects of this Court's exercise of jurisdiction.

As with the definition of "finality" in the Market Street example, within Constitutional and statutory parameters this Court controls and defines the nature and scope of jurisdictional conditions precedent which allow for the ultimate exercise of Certiorari jurisdiction. This is necessary to minimize variable and indeterminate factors. Market Street Ry. Co., supra. However, as in the case of Henry v. Mississippi, supra, state procedural requirements must be satisfied when failure to do so materially affects this Court's practical ability to exercise appellate or certiorari jurisdiction. Because Petitioner failed to take proper steps to stay the state court proceedings (including the issuance of the remittitur) the Writ now sought is directed to a state court which lacks subject matter jurisdiction.

No doubt, Petitioner, State of South Carolina, should have requested a Stay of the state court proceedings in this matter before it sought certiorari review in this Court. 28 U.S.C. §2101(f) e.g. California v. Riegler, 449 U.S. 1319 (1981); Fare v. Michael C., 439 U.S. 1310 (1978). However, no such action was taken to preserve any rights possessed by the Petitioner. Consequently, under state law (which has been in effect throughout this century) the Supreme Court of South Carolina lost jurisdiction to act further in this

case. This is a fatal default committed by Petitioner and bars the review it seeks in this Court.

Legal orders validly and properly made in obedience to the higher court are not to be set aside by the subsequent granting of a certiorari writ. Louisville N.A. & C.Ry. Co. v. Louisville Trust Co., 78 F. 659 (6th Cir. 1897). Consequently, the South Carolina Supreme Court's issuance of the state remittitur to the Court of General Sessions for Charleston County, conferring subject matter jurisdiction over the case on the inferior court, is not defeated by a subsequent granting of the writ by this Court.[2] And this Court has held that subsequent proceedings taken in accordance with local rules of procedure can defeat this Court's appellate jurisdiction. Southern and Northern etc. v. Public Utilities Comm. of Calif., 434 U.S. 9, 98 S.Ct. 251 (1977).

This Court has jurisdiction only over the Supreme Court of South Carolina and not the Court of General Sessions for Charleston County, South Carolina. Beilan v. Board of Public Education of Philadelphia, 357 U.S. 399 (1958).

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[2]At this point, if the Market Street case needs to be distinguished procedurally, it should be noted that a stay of the administrative order had been sought and obtained in the state court system in that case. 65 S.Ct. at 553. Therefore, unlike Petitioner State of South Carolina, action had been taken in the Market Street case to preserve the status quo pending an ultimate resolution of the dispute. Secondly, the Court's opinion in Market Street gives no indication that a challenge to this Court's jurisdiction was made on the procedural grounds advanced herein.

Because under local law jurisdiction over the case now resides with the inferior court, Petitioner South Carolina must affirmatively show that any writ of certiorari to the inferior court could not have been directed to the Supreme Court. C.f. Fisher v. Perkins, 122 U.S. 522 (1887). This Court has held that a writ of error addressed to a state's highest court must be dismissed if that court lacks jurisdiction over the matter. Randall v. Board of Commissioners, 261 U.S. 252, 43 S.Ct. 252 (1923). Since as a matter of state law the Supreme Court of South Carolina now lacks jurisdiction over this case, Petitioner's Writ of Certiorari to the Supreme Court of South Carolina must be dismissed.

IV. ADVISORY DETERMINATION

A.

Under 28 U.S.C. §2106 this Court may take various actions upon orders ". . .of a court lawfully brought before it for review. . ." However, neither 28 U.S.C. §2106 nor 28 U.S.C. §1257 empowers this Court to order a state court to exercise subject matter jurisdiction over a cause in contravention of state law, when that jurisdictional power has been lost as a result of a party litigant's procedural

default.[3] To reach a contrary conclusion could require the Supreme Court of South Carolina to act in a manner which is inconsistent with century old precedent and places this Court in the partial position of moving to protect the interests of one party litigant when that party has itself neglected to do so. Application of this procedural rule, therefore, could nowise be construed as constituting merely an attempt to "evade review." See Konigsberg v. State Bar of Calif., 366 U.S. 36, 82 S.Ct. 21 (1961); Henry v. Mississippi, supra.

B.

As previously noted Demetrius Gathers has filed a Motion for a Speedy Trial in the court which now has jurisdiction over the matter. Consequently there is no reason why Mr. Gathers cannot be retried at this time and sentenced to life imprisonment. Therefore, any decision rendered by this Court on Petitioner's request for certiorari review would be advisory only on the scope of Eighth Amendment law in that Gathers' death sentence cannot be reinstated absent subject matter jurisdiction in the state Supreme Court. Advisory opinions by this Court are

---

[3]On this ground cases such as Aetna Casualty Co. v. Flowers, 330 U.S. 464, 67 S.Ct. 798 (1947) can be distinguished. Those cases permit a recall of a federal circuit court remand, and thus do not reach matters of state court jurisdiction.

not favored, North Dakota State Board of Pharmacy v. Snyder's Drugstores, Inc., 414 U.S. 156 (1973); Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459 (1945), and can encroach upon the plenary powers reserved by the state Supreme Court. Johnson v. Radio Station WOW, 146 Neb.429, 19 N.W.2d 853 (1945). Also see United States v. Fruehauf, 365 U.S. 146, 81 S.Ct. 547 (1961) where this Court refused to give an advanced expression of legal judgment upon issues which remained unfocused. The Eighth Amendment question in the present case is in a similar posture because we do not know at this time the true nature of either the State's theory of the case at resentencing or the evidence to be introduced at that time.

CLARIFICATION OF OPINION

On October 25, 1988, Demetrius Gathers filed a "Motion for Clarification of Opinion" with the Supreme Court of South Carolina. To that motion on November 23, 1988, Petitioner responded that the state Supreme Court lacked jurisdiction to entertain such a request. While this Court may remand a case for clarification of opinion if it cannot readily be discerned whether the opinion rests on application of state law or federal law, Orr v. Orr, 440 U.S. 268, 277 99 S.Ct. 1102, 1110 (1979), we would submit that such a remand by this Court could only be made if the

record shows that certiorari jurisdiction had been established ab initio. As of the date of this motion, the Supreme Court of South Carolina has not ruled on the Motion for Clarification.

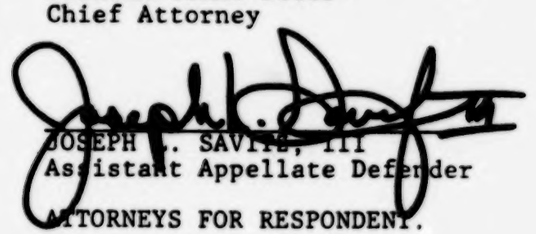
CONCLUSION

WHEREFORE, Demetrius Gathers would respectfully request of this Court that the Petition for Writ of Certiorari be dismissed as improvidently granted as a result of Petitioner's procedural default; in the alternative and subject to the foregoing prayer, we would request that this Court stay the proceeding in this Court and remand the case for clarification, Orr v. Orr, supra; in the alternative and subject to the foregoing, we would request that the Petition for Writ of Certiorari be dismissed without prejudice pending the outcome of Respondent's Motion for Clarification now pending in the state Supreme Court. Southern & Northern, etc., v. Public Utilities Comm. of Calif., supra.

Respectfully submitted,



WILLIAM ISAAC DIGGS
Chief Attorney



JOSEPH L. SAVITZ, III
Assistant Appellate Defender

ATTORNEYS FOR RESPONDENT.

This 7th Day of December, 1988.

EXHIBIT A

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

June 17, 1988

The Honorable Howard A. Taylor
Clerk of Court, Charleston County
P. O. Box 293
Charleston, SC 29401

Re: The State v. Demetrius Gathers

Dear Mr. Taylor:

Enclosed is the remittitur in the above case.

By copy of this letter, all counsel of record are advised of the action of the Court.

Sincerely yours,

Clyde N. Davis, Jr.
CLERK

CND,JR/csl

Enclosure

cc: Joseph L. Savitz, III, Esquire
Joseph F. Kent, Esquire
The Honorable Donald J. Zelenka

EXHIBIT B

STATE OF SOUTH CAROLINA,)
)
COUNTY OF CHARLESTON.)

IN THE COURT OF GENERAL SESSIONS
CASE NO. 88-GS-10-046

STATE OF SOUTH CAROLINA,)
)
VS.)
)
DEMETRIUS GATHERS,)
)
Defendant.)

MOTION FOR SPEEDY TRIAL

Comes now, Demetrius Gathers, by his Attorney, J. Wescoat Sandlin, moving that he be granted a speedy trial.

J. Wescoat Sandlin
Attorney for Defendant
18 Broad Street, Suite 304
Charleston, S. C. 29401
(803) 723-6559

October 27, 1988

STATE OF SOUTH CAROLINA,)
)
COUNTY OF CHARLESTON.)

IN THE COURT OF GENERAL SESSIONS
CASE NO. 87-GS-10-0417

STATE OF SOUTH CAROLINA,)
)
VS.)
)
DEMETRIUS GATHERS,)
)
Defendant.)

ACKNOWLEDGMENT OF SERVICE

Service of a copy of the Motion For Speedy Trial in the above entitled action hereby acknowledged at Charleston, South Carolina, this 31st day of October, 1988.

/s/ Sheila Mastersond
SOLICITOR, NINTH JUDICIAL CIRCUIT

No. 88-305

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA,

PETITIONER,

V.

DEMETRIUS GATHERS,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Motion to Dismiss in the above entitled case has been served upon opposing counsel, Donald J. Zelenka, Chief Deputy Attorney General, by mailing one (1) copy in an envelope properly addressed with postage prepaid this 7th day of December, 1988.

/s/ William Isaac Diggs
WILLIAM ISAAC DIGGS
Chief Attorney

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 7th day
of December, 1988.

/s/ Jane B. Hester (L.S.)
Notary Public for South Carolina

My Commission Expires: 1-6-96.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

A

No. 88-305

In The
Supreme Court of the United States
October Term, 1988

—o—

STATE OF SOUTH CAROLINA,

Petitioner,

vs.

DEMETRIUS GATHERS,

Respondent.

—o—

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

—o—

JOINT APPENDIX

—o—

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* Counsel of Record

Petition for Certiorari Filed August 5, 1988
Certiorari Granted October 11, 1988

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
September 17, 1986	Demetrius Gathers arrested and charged with murder and criminal sexual conduct concerning the death of Richard Haynes on September 13, 1986.
January 12, 1987	Gathers indicted for the offenses of murder and criminal sexual conduct by the Court of General Sessions.
January 14, 1987	State notifies the defendant and counsel of its intention to seek the death penalty.
March 2, 1987	Gathers re-indicted by the Court of General Sessions for the crimes of murder and criminal sexual conduct.
March 16, 1987	Gathers' trial commences before the Honorable Richard E. Fields, Presiding Judge in the Court of General Sessions for Charleston County, South Carolina.
March 20, 1987	Gathers is convicted of murder and criminal conduct in the first degree.
March 21, 1987	Sentencing proceedings held and jury recommends the death penalty and trial court sentences Gathers to the death penalty for murder and thirty (30) years consecutive for criminal sexual conduct in the first degree.
March 30, 1987	Notice of Intent to Appeal to the South Carolina Supreme Court filed.
June 6, 1988	Opinion *State v. Demetrius Gathers* filed by the South Carolina Supreme Court.

August 5, 1988	Petition for Certiorari filed by the State of South Carolina.
October 11, 1988	Petition for Certiorari granted by this Court. -

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CHARLESTON COUNTY
COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

v.

DEMETRIUS GATHERS

EXCERPTS FROM TRIAL

EXCERPTS OF GUILT PHASE TESTIMONY OF DOROTHY LOUISE HAYNES

(p. 560) DOROTHY LOUISE HAYNES, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Condon:

* * *

(p. 561) Q. And what number child was Ricky Haynes?

A. Fourth.

Q. He was your fourth child?

A. (Nodding affirmatively)

Q. And he went to high school at Middleton, I believe?

A. Wallace and Middleton.

Q. Middleton. And where did he live in September of last year?

A. He lived in the north area on John Street.

Q. How long had he lived there?

A. Almost approximately three months.

Q. Three months?

A. Uh-huh.

Q. And as I understand it he had some odd jobs in September?

A. Yes.

Q. Didn't have regular employment?

A. No.

Q. And he had some mental problems, didn't he?

A. Yes.

(p. 562) Q. And he had been in and out of our mental hospital a few times?

A. Three times.

Q. Three times. When his troubles began—when did his mental troubles begin?

A. Approximately about two years.

Q. About two years ago?

A. Yes, uh huh.

Q. But you never had any problems with him in terms of violence, did you?

A. No.

Q. And he—directing your attention to September of last year, on that Saturday night.

A. Yes.

Q. You saw him that Saturday, didn't you?

A. Yes.

Q. What time did he come to your home?

A. He came to my house about twenty minutes to nine.

Q. Twenty minutes to nine?

A. Uh huh.

Q. And did he have anything with him when he came to visit you?

A. Yes, he had a bag, and he set it down in the . . .

Q. Now you called him Ricky, didn't you?

A. Ricky, yes.

(p. 563) Q. And he was a religious person, wasn't he?

A. Yes, he was.

Q. Tell us about that.

A. He got saved about three years ago, before he got really in this mental problem. And after that he got sort of mentally disturbed—I am sorry, before that—and he came to the Lord, and he loved the Lord.

Q. Did he often carry his religious items—

A. He carry his religious item, his Bible; and he talks to people all the time about the Lord.

Q. He was sort of a preacher, wasn't he?

A. Yes, he was.

Q. And did he give himself a title?

A. Yes.

Q. Called himself Reverend Minister?

A. Right.

Q. But he had no formal religious training, did he?

A. No, not really.

Q. Did he have a church?

A. Yes, he was at my church and also at Bethel Pentecostal Holiness.

Q. Was he married or unmarried?

A. Unmarried.

Q. Did you have any knowledge of him being a homosexual in any way?

(p. 564) A. No, he was not.

Q. And on that night you said he got to your home about twenty minutes to nine?

A. Yes.

Q. How close is your home to the bike pathway?

A. I will say about probably five hundred yards.

Q. Very close?

A. Yes.

Q. Five hundred yards?

A. Yes.

Q. And did he have occasion on that night to leave?

A. Yes.

Q. About what time did he leave?

A. He leave my house about—it was about 10:15.

Q. At night?

A. Yes, uh huh.

Q. And did he say where he was going?

A. No. I tried to get him to stay, and he said he was going. And—

Q. Did you have the impression he was coming back or going away?

A. Yes. He told me, said he was going but he wasn't going home, so I thought well he would just go, like he liked to wander around, and come back. That is what he usually does.

(p. 565) Q. Did he take his belongings with him?

A. Yes.

Q. Did he have occasion to refer to money in any way?

A. Well, yes, but he didn't have any that night.

Q. Did you lend him some money?

A. Yes, I give him five dollars.

Q. Was that five single dollar bills or one—

A. No, it was one five dollars bill.

Q. And, of course, he didn't come back that night?

A. No, he didn't.

Q. And what time were you notified?

A. This was about three o'clock in the morning.

Q. Three o'clock? That would be Sunday morning?

A. Yes.

Q. I want to show you a few items here. Your Honor, I believe these would be basically without objection at this point.

Mr. Kent: That is true, Your Honor.

By Mr. Condon:

Q. State's Exhibit Number 7?

A. Yes.

Q. Is that—

A. All both.

Q. And State's Exhibit Number 10?

A. Yes.

(p. 566) Q. These are Ricky's Bibles?

A. Yes.

Mr. Condon: Your Honor, I want to move these into evidence at this time.

The Court: Admitted without objection, appropriately marked, State's exhibit.

(Thereupon, the items previously marked as State's Exhibits 7 and 10 were received into evidence.)

By Mr. Condon:

Q. And, Mrs. Haynes, State's Exhibit Number 8, do you recognize that?

A. Yes. That is olive oil, what he used to annoint people and pray for them.

Q. Used to annoint people and pray for them?

A. Yes.

Q. That is what Reverend Minister Haynes had?

A. Yes.

Q. He carried that with him?

A. Yes.

Q. And State's Exhibit Number 9, which appears to be a sheet? Do you recognize that, Mrs. Haynes?

A. That is his.

Q. That is Ricky's sheet?

A. Yes.

Q. And he carried this with him on that night?
(p. 567)

A. Well I didn't know what he had in the bag, but I know that is his things.

Q. I understand. So you didn't know what he had in the bag when he was leaving—

A. Right, I didn't know—

Q. —but that was a sheet he would normally have?

A. Yes. Yes.

Mr. Condon: Your Honor, I would like to move both of these into evidence.

The Court: Admitted without objection, appropriately marked, State's exhibit.

(Thereupon, the items previously marked as State's Exhibits 8 and 9 were received into evidence.)

By Mr. Condon:

Q. Now, Mrs. Haynes, do you know the defendant, Demetrius Gathers?

A. No, I don't.

Q. And your son was thirty-one years of age—

A. Yes.

Q. —when he was killed?

A. Yes.

• • •

(p. 568) By Mr. Kent:

• • •

Q. Oh. What was he wearing when you last saw him, Mrs. Haynes.

A. Light-colored shirt and black pants.

Q. Were they regular trousers?

A. Yes, uh huh.

Q. Do you know if he had any other clothing with him?

A. No. I didn't look in his bag. Except I know those is his things that is up here.

• • •

EXCERPTS OF THE TESTIMONY OF ESDAVAN DUVAL HARDRICK

• • •

(p. 573) Q. So it was you, Demetrius, Zandell and Ron?

A. Ron had left and went home.

Q. What time did he go home?

A. Well I will say it was about five then.

Q. What were y'all doing, just bumming around, or what?

A. Yes.

Q. Were you drinking?

A. No.

Q. And Ron went home about five?

A. Yes.

Q. Tell us about this bike path. Have you been on that bike path before?

A. Yes, sir.

Q. What is it like?

A. Well it's just a long bike path running from Wappoo Road all the way down to Highway 61. You know, people just walk up down there, walk up or jog or ride their bike.

Q. How far away is that bike path from your home?

A. Not very far. I live almost by Forest Park, and the bike path is right next to Forest Park.

(p. 574) Q. All right. Five or six o'clock what were you doing?

A. By six o'clock, me and Demetrius and Zandell been together, and we walked over to the park, Forest Park.

Q. Where is Forest Park?

A. That is located on Playground Road right next to the bike path.

Q. Right next to the bike path?

A. Uh huh.

Q. What did y'all do there?

A. Well, we sat out on the park for a little while with this other guy, and then from there we walked back down to the bike path.

Q. What time was that?

A. I don't know. It was about 6:30 at this time, I guess.

Q. What were you doing, walking?

A. Yes.

Q. Then what did you do?

A. Well after we got to the bike path we met up with Dyonzoria.

Q. Dyonzoria?

A. Yeah.

Q. Did you also call him Dee Brown or Dondrell Brown?

A. Dee Brown.

Q. And what time did you meet up with him?

(p. 575) A. It would have to be about 6:30 or 7:00 then.

Q. Was it dark at this time?

A. No, it wasn't dark.

Q. What did y'all do?

A. Well we walked around for quite some time.

Q. Anybody have a radio?

A. Yeah, I had a radio.

Q. What kind of radio was it?

A. It was kind of a small radio, not very large.

• • •

Q. Anybody have an umbrella?

A. Yes. Dyonzoria was walking with his umbrella.

• • •

Q. Steven, I want to hand you what is marked State's Exhibit 6 for identification purposes at this point. Do you recognize this umbrella?

A. Yes, sir.

Q. What umbrella is this?

A. This was the umbrella that Dyonzoria was walking with.

• • •

Mr. Condon: Your Honor, I want to move this (p. 576) into evidence at this time.

The Court: Without objection?

Mr. Kent: No objection.

The Court: Admitted, appropriately marked, State's Exhibit.

(Thereupon, the umbrella previously marked as State's Exhibit 6 was received in evidence.)

By Mr. Condon:

Q. Okay. Was this seven o'clock?

A. About seven o'clock.

Q. And where did y'all go?

A. Well from there we walked around in Ardmore. We walked over to Sequoia Apartments.

• • •

Q. What did y'all do there?

A. We talked to some guys there.

Q. How long did that last?

A. About five or ten minutes at the most.

Q. And who was with you?

A. It was me, Dyonzoria, Zandell Hayes and Demetrius.

• • •

(p. 577) Q. What happened?

A. From there we walked around. Then we went back over to the Majik Market out there by the 20th Century Fox. We was out there for about ten minutes.

Q. You went to the Majik Market by 20th Century Fox?

A. Yes.

Q. What is the 20th Century Fox?

A. That is a club.

Q. Where is that located?

A. On Highway 61.

Q. And the Majik Market is next to it?

A. Yes, sir.

Q. How far away is that spot from the bike path?

A. That is a good deal away from there. I can't say how far, though.

Q. Went by foot?

A. Yes.

Q. What did you do there at the Majik Market and 20th Century Fox?

A. Well we sat out there for a little while, you know. And then from there we went back to the bike path. When we left the bike path we went over to the Beer Barn, which is now called—

Q. Went where now? To the Beer Barn?

A. Yes.

(p. 578) Q. Where is that located?

A. That's located on Highway 17.

Q. Highway 17? So you went from Highway 61 to Highway 17, the four of you?

A. Yes, sir.

Q. How long did that take you to get there?

A. About twenty minutes or thirty minutes.

Q. You went to the Beer Barn?

A. Yes.

Q. Did you buy beer there?

A. Yes, sir.

• • •

Q. How much did you buy?

A. A twelve-pack.

Q. What happened after that?

A. Well from there we went back down to the bike path, where we had met up with Mr. Haynes.

Q. All right. What time, about, did you leave the Beer Barn?

A. At this time it would have been about eight or nine.

• • •

(p. 579) Q. Were you drinking beer along the way?

A. Yes.

Q. Who bought the beer?

A. We got someone to buy the beer for us, but Dyonzoria went with him.

Q. Who paid for it?

A. Me and Zandell had some money. We kind of like pitched in together.

Q. How many beers did you drink before you got back to the bike path?

A. About one.

• • •

Q. And you say you got up with Ricky Haynes, is that your testimony?

A. Yes.

Q. Do you know Ricky Haynes?

A. No, I do not.

• • •

Q. And where was he when you first saw him?

A. He was standing by the bench on the bike path.

• • •

(p. 580) Q. What was he doing?

• • •

Q. What was the lighting like? Was it dark or light?

A. It was dark out there.

Q. Dark out there? And when you got near Ricky Haynes, what was he doing?

A. It looked like he was changing clothing to me.

Q. You say it looked like he was changing clothing. Can you explain that, please?

A. Well because it looked like he was pulling up his pants at the time.

Q. Did he pull up his pants?

A. Yes.

Q. After he pulled up his pants what did Ricky Haynes do?

(p. 581) A. He sat back on the bench.

Q. How big was he?

A. Not very big.

• • •

Q. When he sat back on the bench what did y'all do?

A. When he came up to him, all of us told him hi, hello. Then we sat down next to him. And we started drinking our beer. We had the radio on at the time. And then Demetrius was talking to the guy, and he said that he didn't want to talk to him at the time.

Q. Who said that?

A. Mr. Haynes.

Q. What was Demetrius saying to him?

A. I don't know. I did not overhear it.

Q. What happened?

A. Well after that I believe Demetrius struck the man with his fist.

Q. You say you believe he did?

A. Well he did.

Q. What did you see?

A. I saw him hit the man with his fist.

Q. Where were you at this time?

A. I was sitting on the other end of the bench.

Q. How long was the bench?

(p. 582) A. Not very long. I guess a little longer than this right here. (Indicating)

Q. About four feet?

A. Yes.

Q. Where was Zandell Hayes?

A. He was standing more or less like on the side of the man.

Q. Where was Dyonzoria Brown?

A. He was sitting like next to me.

Q. Right next to you?

A. Yes.

Q. So two of you are on the bench next to Ricky Haynes?

A. (Nodding affirmatively)

Q. Zandell was behind him?

A. Yes.

Q. And your testimony is Demetrius Gathers struck him in the face with a fist?

A. Yes, sir.

Q. Where did he hit him in his face?

A. I guess about in his mouth.

Q. Excuse me?

A. In his mouth.

Q. What happened?

A. Well he fell back. When he fell back, he fell more (p. 583) or less into Zandell Hayes. And at that time he went wild.

Q. Who went wild?

A. Mr. Haynes.

Q. What happened?

A. After that, Zandell Hayes had hit the man.

Q. How did Zandell Hayes hit the man?

A. Hit him with his fist.

Q. Where?

A. I believe in his face.

Q. What happened next?

A. Then he kind of like moved up the bike path, and him and Demetrius was fighting.

Q. Who moved up the bike path?

A. Mr. Haynes.

Q. How did he move?

A. They were more or less tussling up the bike path.

Q. Who was tussling?

A. Mr. Haynes and Demetrius.

Q. How far away did they go up the bike path?

A. Not very far up the bike path. Let me see. I can't recall how far it was.

Q. Over ten yards?

A. It could have been about ten yards, yes.

Q. This would have been Demetrius Gathers and Ricky (p. 584) Haynes tussling?

A. Yes, sir.

Q. Explain that. How were they tussling?

A. Well they were fighting, and Mr. Haynes was backing up, and then they kind of like hooked up together, and they were like rolling on the ground.

Q. What was Zandell Hayes doing?

A. He was over there with me at the time.

Q. What was Dyonzoria Brown doing?

A. He was over there with me at the time.

Q. What happened next?

A. After he had pinned the guy, Mr. Haynes, on the ground, that is when Dyonzoria went over there. And I believe he hit the guy. He hit the guy a couple of times.

Q. How did he hit him?

A. He hit him with his foot and with his fist.

Q. Where did he kick him?

A. In his ribs.

Q. Where did he hit him with his fist?

A. Probably about the same place.

Q. In his ribs?

A. (Nodding affirmatively)

Q. How many blows at that time?

A. I don't know. I couldn't say.

(p. 585) Q. What happened next?

A. Well then after that Dyonzoria had got a bottle, and he struck the guy in the head with the bottle, twice.

Q. How far away were you at this time?

A. I was still by the bench, about—

Q. You can estimate about ten yards?

A. Ten yards.

Q. What happened next?

A. Then Demetrius had picked up a bottle, and he hit the guy with the bottle until it finally broke, which was about three times.

Q. Same bottle or a different bottle?

A. Same bottle.

Q. Was Ricky Hayes saying anything?

A. I believe he was saying, "Oh, Lord".

Q. You say you believe he was saying "Oh, Lord". What was he saying?

A. That is what it sounded like to me, "Oh, Lord".

Q. How many times did he say that?

A. About twice.

Q. After the bottle was broken over his head what happened?

A. Well I believe he was unconscious down there because he wasn't moving, and that is when I went over to him and kind of like nudged him with my foot to see if he was all (p. 586) right. At this time me and Mr. Hayes told them let's go. So we walked back into the middle of the path going to Starcastle Apartments, and that is when Dyonzoria had joined up with us. As we were walking

through there we could look back and see the bike path and see that Demetrius and the guy—well Demetrius was still hitting the guy—

* * *

Q. What about the Starcastle Apartments, where were they?

A. That is right—like on the side of the bike path. There is some woods between the bike path and the Starcastle Apartments.

Q. You say that Zandell Hayes and Dyonzoria Brown were with you?

A. We were in the middle of the path.

Q. Going to Starcastle?

A. Yes, on our way to Starcastle.

Q. And your testimony is you looked back?

A. Uh huh.

(p. 587) Q. And you saw what?

A. He was still hitting the guy.

Q. Who was?

A. Demetrius.

Q. How was he hitting him?

A. He was hitting him with the umbrella at this time.

Q. Hitting him with the umbrella?

A. Uh huh.

Q. How did he get that umbrella?

A. Well when Dyonzoria had went to the store he left the umbrella with him.

Q. Left it with who?

A. Demetrius.

Q. At the store?

A. Yes.

Q. Which store?

A. The Beer Barn.

Q. So at that point in time Demetrius got the umbrella?

A. Yes.

Q. And you say he was hitting Ricky Haynes with the umbrella?

A. Yes, sir.

Q. What was Ricky Haynes doing when this happened?

A. He wasn't doing nothing. I believe he was unconscious at the time.

(p. 588) Q. Did he have his clothing on?

A. Yes.

Q. Where was he hitting him with the umbrella?

A. Well he was more or less on his stomach, on his face, at the time; and I believe he was hitting him with the handle part—well he was hitting him with the handle part—and about in his back and his head. Upper part of his back.

Q. So you say he was hitting him with the handle part, meaning he was using this end?

A. Yes.

Q. How far away were you when you saw this?

A. By this time about twenty yards, in the middle of bike path.

Q. What happened next?

A. Well the guy's pants was like not all the way up. It was like, you know, about to his thighs. And then that is when he had got the umbrella and stuck that up the man's behind.

Q. Who did that?

A. Demetrius.

Q. What end did he use?

A. Used the top end of the umbrella.

Q. You mean the white end?

A. Uh huh.

(p. 589) Q. And did you see Demetrius Gathers pull down or touch the clothing of Ricky Haynes?

A. I can't recall that.

Q. How long, if you can say, did he use this umbrella?

A. About three minutes, I guess. Three minutes at the most, three to five.

• • •

Q. Did you hear any noise from Ricky Haynes?

A. I believe he was groaning at the time.

Q. Was it a loud groan or a low groan?

A. A low.

Q. How far away was Ricky Haynes at this point from the park bench?

A. About ten or fifteen yards.

• • •

Q. What did Demetrius Gathers do after he used this umbrella?

A. After that, you know, we called him and tell him let's go. Then we were walking to the Starcastle Apartments, and after we had got out the path that is (p. 590) when he ran and rejoined up with us.

Q. He rejoined up with y'all, is that what you are saying?

A. Yes.

Q. Who was with you at this time?

A. It was Dyonzoria, Demetrius, Zandell and myself.

Q. And you went to the Starcastle Apartments?

A. Yes, we did.

• • •

(p. 591) Q. When you first came upon Ricky Haynes did he have any items out?

A. Yes he had a Bible And some paper.

Q. What was he doing with that?

A. It was just sitting on the bench.

(p. 592) Q. A Bible?

A. Uh huh.

Q. Did you have occasion to go through any of his belongings?

A. Yes, I did.

Q. What did you do?

A. I looked through the bag, through his bags.

Q. Looking for something to steal?

A. Yes.

Q. Did Demetrius Gathers go through his belongings?

A. Yes, he did.

Q. What did he do?

A. Well when he went through his belongings he started throwing things about, just throwing them everywhere, looking through things.

Q. When did he go through his belongings?

A. Right after I did.

Q. Where was Ricky Haynes when this happened?

A. He was still on the ground.

Q. Anybody touching him?

A. No, not at that time.

Q. And at what point did Demetrius go through his belongings?

A. Well it was like, after I had gone over there and nudged the guy to see if he was all right, at that point.

(p. 593) Q. So before the umbrella?

A. Yes.

Q. How long did it take Demetrius to go through his belongings?

A. Not very long. About a minute at the most.

Q. Then he went back to him with the umbrella?

A. Yes, he did.

Q. And hit him over the head?

A. Yes, sir.

• • •

(p. 596) Q. So you are saying all four of you were going back to the bike path? Is that right?

A. Yes.

Q. Why were you going back to the bike path?

A. Well he went back—we was going back to the bike path—we were going back there—I can't really say.

Q. Where did you go?

A. Well after we turned around, me and Dyonzoria, we went back to Rosemary's house.

Q. You and Dyonzoria went back to Rosemary's house?

A. (Nodding affirmatively)

Q. Did you enter that path to go to the bike path?

A. No, we didn't enter it.

Q. You got near it?

A. Yes.

Q. You went back to Rose's house?

A. Yes.

Q. Who had the knife at this time?

A. Dyonz—Demetrius.

Q. And who went with him back to the bike path?

A. Well, right before we had ran back I believe that Mr. Hayes had already went back there.

Q. Mr. Hayes, who is that?

A. Zandell.

Q. Zandell Hayes. You call him Zan, don't you?

(p. 597) A. Yes.

Q. He is your good friend, isn't he?

A. Yes, he is a good friend.

Q. All right, what happened?

A. After that, me and Dyonzoria were still up there at Rose's house. Then Mr. Hayes came back there with us.

Q. You don't call him Mr. Hayes, do you?

A. Well, Zan.

Q. You call him Zan. What happened?

A. After that, that is when Dyonz—Demetrius had came back to the house.

Q. Zandell was on that bike path with him, too, wasn't he?

A. Yes, he was on there.

Q. Both of them went out there?

A. Well Zandell had went a little before him.

Q. Zandell went before him?

A. Yes.

Q. Out to the bike path? And you say Demetrius had the knife?

A. Yes.

Q. How long were they out there on that bike path?

A. Well from the time that we—me, Dyonzoria and Demetrius went out there, Zandell was out there probably about a minute by himself; and when me and Dyonzoria (p. 598) turned around, he came back in about two minutes. And Demetrius was still out there.

Q. When did Demetrius rejoin you?

A. About three to five minutes after we had went back to Rose's house.

Q. You weren't on that bike path a second time, were you?

A. No, I wasn't.

Q. What did Demetrius tell you about what happened on the bike path when he went out there the second time?

A. Well when he had came back he said that he had stabbed the guy.

Q. He told you that?

A. Yes.

• • •

(p. 600) Q. Now back at the Starcastle, about what time are we talking about when Demetrius went back with Zandell on the bike path? About what time?

A. About 9:30 or 10:00.

Q. Could it be later?

A. I don't think it was later.

Q. And you say that Demetrius was on that bike path a little bit longer than Zandell?

A. Zandell was out there a little bit longer than he was.

CROSS-EXAMINATION BY MR. KENT

• • •

(p. 623) Q. Thank you. I believe you stated in one of these statements that you guys generally hang out at this bench?

A. Yes, we do.

Q. Do a lot of drinking there?

A. Yes.

Q. Do a lot of marijuana there?

A. Yes, we do.

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(p. 629) Q. And you come up to this bench, and there is Mr. Haynes?

A. Yes.

Q. And he apparently is changing clothes?

A. Yes.

Q. His trousers are not all the way up?

A. No they weren't. He was on the verge of pulling them up.

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(p. 631) Q. What were you all doing while you are drinking all this beer there at the bench?

A. Listening to the radio.

Q. Did you talk to Mr. Haynes?

A. We told him hello.

Q. Anybody else talk to Mr. Haynes other than that?

A. Well Demetrius was talking to him, and he said that he didn't feel like talking to him.

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(p. 633) Q. Are you sure—as you sat there listening to the radio with Mr. Brown between you and Richard Haynes, are you sure who punched Mr. Haynes first?

A. Yes, I was.

Q. And you were talking to Zan Hayes at the time this happened?

A. I was talking to Dee Brown at the time.

Q. Mr. Haynes goes to the ground with the first punch?

A. When Demetrius had hit him, he fell back into Zandell.

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(p. 634) Q. But Dee Brown gets up?

A. Yes, he did.

Q. And he joins into the tussle?

A. Not right then. After Demetrius had already pinned the guy on the ground.

Q. Now did Demetrius pin Richard Haynes on the ground right there by the bench?

A. No, he didn't.

Q. It was on up the path some?

A. Yes, it was.

Q. I believe you have testified about ten yards?

A. Yes.

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Q. About that distance? Once Demetrius is fighting with Richard Haynes on the ground, that is when Dee Brown gets into it?

A. Yes, he does.

(p. 635) Q. And then he comes over and hits this man with the bottle?

A. He kicked him a couple of times first.

Q. He kicked him first?

A. Uh huh.

Q. Where did he kick him?

A. Along the ribs.

Q. Did the man resist after that? Or do you remember?

A. He was on the ground. He was pinned. He couldn't do anything.

Q. You were also separated from him by thirty or so feet, ten yards?

A. (Nodding affirmatively)

Q. And three men. Isn't that right?

A. Yes.

Q. And Zan, Demetrius and Dee Brown are all around this fellow when this is going on, isn't that correct?

A. Yes, it was.

Q. And you remained on the bench, is that right?

A. Yes, it is.

Q. This didn't bother you, either?

A. It had bothered me, but I couldn't do much about it.

Q. But you stayed right there, is that right?

A. I moved after Dyonzoria had hit the guy in the head with the bottle a couple times, and Demetrius, to check (p. 636) and see if he was all right.

Q. Was that before or after you went into his belongings.

A. That was right before.

Q. Right before. So you also assured yourself that he was disabled before you went into his bag of belongings, isn't that right?

A. He was unconscious, yes, he was.

Q. You knew that. Is that right?

A. No, I didn't at the time. He was groaning.

Q. This man had two bags of belongings, do you remember?

A. Yes, he did.

Q. Okay. Did you go into either of them while these three fellows are beating on Mr. Haynes?

A. I looked in the bag.

Q. Didn't you see anything you liked?

A. No, I didn't.

Q. Now they stop beating him at some point, correct?

A. Yes, they do.

Q. And it's at that point that you say Demetrius Gathers jabbed this man in the behind with the umbrella?

A. Well at the point that he did that I was in the path.

Q. You were in the path?

(p. 637) A. (Nodding affirmatively)

Q. You had already started to go along with—who, Dee Brown?

A. And Zandell.

Q. And you were a ways into the path?

A. We were like in the middle of the path.

Q. In the middle? Where was this man's body located at that point?

A. About ten yards.

Q. Up away from the bench?

A. Yes.

Q. Did you testify, sir, that Demetrius Gathers probed this man with the tip of his umbrella in his behind for two or three minutes?

A. Well he didn't do that for two or three minutes, but he was beating the man with the umbrella for about that long.

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(p. 649) Q. Zandell definitely did have the knife on the way to McNeal's right after he had come from the bike path and had been there alone for some time, isn't that correct?

A. Well from the bike path, when Demetrius came back, he had the knife; and he told us that he had stabbed the man. He showed the knife to us.

Q. Mr. Hayes?

A. No, Demetrius.

Q. You did not see the knife?

A. He shown it to us when he said that.

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CLOSING ARGUMENT OF SOLICITOR CHARLES M. CONDON

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(p. 1201) Mr. Condon: On behalf of the Haynes Family, on behalf of the people who have been here, I'm sure on behalf of the defendant himself, we thank you for your close attention.

At this stage of the proceeding your duty at (p. 1202) this point becomes to decide the appropriate punishment for the murder of Richard Allen Haynes. And His Honor will instruct you on the applicable law in South Carolina, and I want to briefly go through that with you, if I might.

You are to weigh, in coming to your decision, the mitigating circumstances—that is the circumstances that lessen the severity of this murder—as well as the aggravating circumstances—that is those circumstances that make it worse. Before a death sentence can be imposed in this state the jury must find beyond a reasonable doubt the existence of an aggravating circumstance. In this case we rely on the aggravating circumstance of criminal sexual conduct in the first degree. You have found him guilty of that beyond a reasonable doubt, and that has in effect been decided although you have to make a further finding at this point, and we rely on that circumstance.

Once that circumstance is found the mitigating circumstances have to be considered. If you do find mitigating circumstances—and that is circumstances that will lessen the severity of this murder—the death penalty can still be imposed.

Let's go through the mitigating circumstances (p. 1203) that the defendant relies upon in this case. His Honor will instruct you that one of the mitigating circumstances or a circumstance that they think lessens the severity of this murder is the age or mentality of the defendant. Well the proof has been very clear. He is nineteen years of age. He has family that loves him. No evidence of any mental disease or defect. Knows what is going on. Able to go through school.

Now there has been some talk here of: This is a young man feeling his oats. Or boys, I think that was the term. Well you tell Richard Allen Haynes about these boys out there on that bike path. He knows what he is doing.

They also talk about the lack of the capacity of the defendant to conform his conduct to the requirements of law. He has full capacity to do that. He chooses not to. Look at his record.

They also say the defendant was under the influence of mental or emotional disturbance. The only disturbance that this defendant had on that night was that he was disturbed that he got blood on his shirt and he had to change that before he went to the nightclub.

And they talk about another mitigating or a (p. 1204) circumstance that lessens the severity of this murder is the fact that he doesn't have any prior convictions involving the significant use of violence against other people. Well you can look at his record. He has been through the system. Let's look at the totality of the circumstances in this case. You will have these exhibits. Look at them again.

Oh, and how not to decide this case. His Honor is going to charge you, and of course it only makes common

sense, in terms of being comfortable with your verdict and proud of it, I would be the first to say that this is not an easy procedure whatsoever. No one takes any comfort or any pleasure whatsoever in sentencing anyone to die.

It's your responsibility in this case to make this decision. It's not a easy one. But you have all stated under oath in the pretrial part of this trial that if the facts and the circumstances warranted it and the law allowed it you could vote for and sign your name to a document calling for the death penalty. This is the case. It's not even close.

And look at the evidence. This defendant, Demetrius Gathers—and if you were to decide this (p. 1205) case based on sympathy—and, of course, that is not the way to do it—but looking at Reverend Minister Haynes and his family and his situation, you would sentence this defendant to death in a minute. But you don't do it that way. You look at the mitigating and aggravating circumstances. You look at the individual characteristics of this defendant and the crime. Let's look at that.

First of all, this is State's Exhibit Number 38, the home of Demetrius Gathers. Middle class home. He has got a roof over his head. Schooling provided to him. Teachers, very impressive teacher. Family members that care for him. No talk here of being forced into stealing for the sake of getting money for food.

Look at that night. This defendant had money. Go looking to buy marijuana. They go and in fact buy alcohol. He has got a home. What does he choose to do? Goes to a nightclub. Has money for a nightclub. Those characteristics. It doesn't stop there, doesn't stop there by any

means. You can talk in terms of his prior record. You are aware of those. Family Court. Court of General Sessions. And now he is before you for a most heinous act.

And look in terms of what happened out there on (p. 1206) that bike path. Reverend Minister Richard Allen Haynes was at his parents' home. Dorothy Haynes, Jesse Haynes. And he decides to go for a walk. This defendant, drinking his beer, comes upon him, with others. Reverend Minister Richard Allen Haynes has his Bible out, sitting on a park bench in our county, in our community, at a place where he had every right to be, and he chooses not to talk to this defendant.

What ensued is hard to believe and to describe, but you have heard the testimony. An attack begins that happens in this country, in this community, and while Reverend Minister Haynes begs for mercy--Lord no, Lord no —the degradation continues. The circumstances of aggravation in this case are overwhelming.

Under your responsibilty, under our law, and weighing the mitigating and aggravating circumstances, the verdict in this case, the decision, must be death.

And you will have this instrument of torture and pain. And when the defendant talks about him being a young man and feeling his oats, not knowing any better, you tell Ricky Allen Haynes, when this instrument was in his private body part, that this (p. 1207) defendants was a young man who didn't know what he was doing.

And as his life fluids seeped out onto our public park, and as he was losing consciousness and with the pain shooting throughout his body, you tell Reverend Minister

Richard Allen Haynes that this defendant was feeling his oats, was acting wild and crazy, and this was a high school prank. And it doesn't stop there.

After using that instrument he goes and socializes and goes back. The depravity, the premeditation, the willfulness, the wantonness. An animal would have gotten more mercy. He goes back and with a knife stabs Reverend Minister Haynes in his abdomen. And with little thought, with no thought, as to Reverend Haynes' rights, as to Reverend Haynes' family, goes back and goes to the 20th Century Fox nightclub. Goes to sleep that night. I am sure he slept very peacefully because there was no concern to him of this atrocity.

And you will have the exhibits to think about what happened out there. You will have some exhibits in there that will tell you, tell you what your decision must be in this case, although it's not pleasant. We know from the proof that Reverend (p. 1208) Minister Haynes was a religious person. He had his religious items out there. This defendant strewn them across the bike path, thinking nothing of that.

Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had this religious items, his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person. Cared little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks.

But look at Reverend Minister Haynes' prayer. It's called the Game Guy's Prayer. "Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask for the stuff to give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anthing come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks (p. 1209) and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me to always play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to upperent me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life."

Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune.

And he took things as they came (p. 1210) along. He was prepared to deal with tragedies that he came across in his life.

And there has been some talk about this being a tragedy. Well let's get one thing straight. This isn't a tragedy. Tragedy is a birth defect, something over which we have no control. This is an atrocity. This was a willful, premeditated act of this defendant, who is Charleston County, on our shores, in this country, took with the most eager pleasure the life of another in the most gruesome, hard to describe and hard to believe circumstances. The appropriate punishment in this case is death.

You will find some other exhibits in this case that tell you more about a just verdict. Again this is not easy. No one takes any pleasure from it, but the proof cries out from the grave in this case. Among the personel effects that this defendant could care little about when he went through it is something that we all treasure. Speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card.

Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit (p. 1211) on a public bench and not be attacked by the likes of Demetrius Gathers. Weigh the aggravating circumstances in this case. Look at it very carefully. Calmly, rationally.

Reverend Haynes believed that he could come onto our public parks and sit and be protected, that the law protected him. That Demetrius Gathers would not reign su-

preme on that public bench. And he doesn't reign supreme. The law in this case protects Reverend Minister Haynes. The proper verdict, the only verdict in this case is death. Thank you.

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PENALTY PHASE ARGUMENT OF DEFENSE COUNSEL WESCOT SANDLIN

(p. 1211) Mr. Sandlin: Ladies and gentlemen of the jury, you have already found Demetrius Gathers guilty in this case. And you are respected for that. It's important that we function as a government of laws. And that justice be done. The question before us is the same question that has been with us since the beginning of this trial, and that is: Where is the justice in a painful situation? There is no way any of us can deny that point. It's a point of agreement that I think is irrefutable.

You have already demonstrated your high regard for human life in returning the verdict that you (p. 1212) have returned. I ask you to continue that high regard, in considering the penalty in this case. We can't restore life. The law allows an option for taking a human life as a punishment. And that kind of contradiction places us constantly in a situation where we must deal with the law and its origins and its impact on society for the good of all people.

The proceedings that we are engaged in that take so much time are proceedings that seem to dwell often in the past. We must dissect what has happened. We must analyze. We must deal with the facts and the law to determine just what happened in the past. There is a reason

why we do this. That reason is so that all of us can live happily in society in a future.

I wish there were some way that Ricky Haynes could speak to us, but that is not possible. Ricky Haynes is a victim, and a victim I don't want you to forget when you go into that jury room to make the determination of sentence. Ricky Haynes has been constantly characterized as Reverend Minister Haynes. The clear implication is that he was a Christian.

I ask you to think about what the implications of that Christian faith were and are and will be in (p. 1213) the future. I ask you to think about what the State has presented and what we have presented in a situation that is filled with seeming contradictions and inconsistencies. Many unanswered questions. Questions that none of us in this room will ever be able to answer, including the defendant himself.

An example of that would be the nightclub and the return to the scene. There is no way that the defendant could have known all of what happened on the bike path. In his statement he has admitted involvement in the event. He has admitted his role. Acting with others in a crime of violence.

In his criminal record you find only one other crime of violence as a juvenile, an incident which he did not provoke, an incident in which he responded. Perhaps in a way very similar to the defendant in this case—I mean to the victim in this case.

All of us are searching for the truth, all of us are looking for justice. Part of the search for justice re-

quires compassion and mercy. In doing that, of course, any of the questions that we have to deal with that we have unanswered for us, not knowing the precise role, the exact role that Demetrius Gathers had in this death, the death of (p. 1214) Ricky Haynes, whatever doubts we have must be resolved in favor of life in prison. Life in prison certainly is punishment. It is certainly not letting someone off.

The real question, ladies and gentlemen, is where will the pain end? The pain for society, the pain for the victim's family, and the pain for the family of the defendant?

When you go into that room to make your decision, there won't be anyone who will second-guess your decision in there and the way you go about making it. You are answerable only to God, the God of us all. Blessed are the merciful.

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PENALTY PHASE INSTRUCTIONS

(p. 1216) The Court: Madame Forelady, ladies and gentlemen of the jury, the defendant, Mr. Demetrius Gathers, has withdrawn his request to make a statement to the jury. I previously indicated that he would. That request has been withdrawn.

Now, Madame Forelady, ladies and gentlemen, it now becomes your duty to decide what sentence you will recommend that this Court impose upon the defendant, Demetrius Gathers. There are three possible verdicts you are to consider in this case. One is the death penalty, which in this state is by electrocution. And the second is life imprisonment with a finding of the existence of a statutory aggravating circumstance. And the third is life imprisonment without a finding of the existent statutory aggravating circumstance.

Now the order in which I explain these three sentences is in no way a recommendation by this Court as to which sentence you should choose to recommend. It is simply that one must be stated.

By this recommendation of sentence form which I (p. 1217) hold in my hand, you the jury may recommend that this Court sentence the defendant to death. Please observe that immediately below the body of this recommendation there are twelve lines. That is where, should you decide to recommend the death penalty, each one of the deliberating jurors will sign his or her name.

It is the law in this state, Madame Forelady, ladies and gentlemen of the jury, that a recommendation for the imposition of the death penalty be a unanimous recommendation, and that each and every deliberating juror sign his or her name to the recommendation form.

I will now read to you the text of this form. It states: "We, the jury, in the above-entitled case, having found beyond a reasonable doubt the existence of the following statutory aggravated circumstance . . ."—at this point there is a place provided for you to write such circumstance, about which I will instruct you further— ". . . now recommend to the Court that the defendant, Demetrius Gathers, be sentenced to death."

Now for this recommendation to be made—that is, that the defendant be sentenced to death—you must first find that a statutory aggravating (p. 1218) circumstance

existed beyond a reasonable doubt. What is a statutory aggravated circumstance? It is a fact, an incident, a detail or an occurrence which the General Assembly of this state has declared by statute would make worse—that is, aggravate—the offense of murder when the two occur together. In other words, it is something which increases the enormity or adds to the injurious consequences of the offense.

Upon this sheet of paper which I hold in my hand are written the words "statutory instructions." You will have this sheet of paper with you in your jury room during your deliberations. The body of this form states, and I quote: "In determining whether to recommend that the defendant, Demetrius Gathers, be sentenced by the Court to life imprisonment or death, you may consider the following statutory aggravating circumstances, to wit: That the murder was committed while in the commission of rape, criminal sexual conduct in the first degree."

The old statutory statute described as rape has been amended in this state to refer to the offense involving a sexual battery as criminal sexual conduct in the first degree, which I previously (p. 1219) explained to you in the guilt phase of this trial.

Now, Madame Forelady, let me emphasize to you that this is the only circumstance you may consider as an aggravating circumstance. Should you find, and it must be a unanimous finding—that is, a finding by each and every one of the deliberating jurors—should you find that the State has proven beyond every reasonable doubt the existence of the aggravating circumstances listed on this sheet of paper, then you would be authorized, which is to say

permitted, to consider recommending to this Court that the defendant be sentenced to death.

What do I mean by the term proven beyond a reasonable doubt? What I do not mean is a weak doubt, or a fanciful doubt. But rather it is a doubt which the name itself suggests, a doubt for which you can give a reason.

And please pay particular attention to this. You are never required to recommend the death penalty. Even if you find that a statutory aggravating circumstances existed at the time the offense occurred.

I instruct you further that should you find the State has not proven that such a circumstance existed, that is to say you find that you still have (p. 1220) some reasonable doubt as to the existence of such a circumstance, then you would not be authorized to recommend the death penalty. And your recommendation must be life imprisonment.

Now should you find beyond a reasonable doubt that the aggravated circumstance listed on this sheet of paper existed at the time of the murder, and should you then decide after weighing such finding against the elements in favor of a recommendation of life imprisonment, about which I will instruct you later ,that the recommendation of the jury is to be that the defendant be sentenced to death, then it would be your duty, Madame Forelady, to write on the recommendation of sentence form the statutory aggravating circumstace which you have found.

That is to be written in these lines. Which is in the body of "Recommendation of sentence, death penalty." Then, Madame Forelady, you and each and every juror

would sign your name in the places provided. And I trust that you understand that.

By these forms which I hold in my hand, you the jury can recommend to this Court that the defendant be sentenced to life imprisonment. I will now read the text of these recommendations forms. "We, the (p. 1221) jury, in the above-entitled case, recommend to the Court that the defendant, Demetrius Gathers, be sentenced to life imprisonment." And you will see under that heading in parenthesis, "without finding the existence of an aggravating circumstance."

The second—or the third form which I will read is that: "We, the jury, in the above-entitled case, having found beyond a reasonable doubt the existence of the following statutory aggravating circumstance, to wit: . . ." — " . . . now recommend to the Court that the defendant, Demetrius Gathers, be sentenced to life imprisonment."

As I said to you earlier, you had three possibilities. You could recommend to the Court that the defendant be sentenced to death. You could recommend to the Court that the defendant be sentenced to life imprisonment with finding of the existent aggravated circumstances. And you can make a finding recommending a sentence of life imprisonment without finding the existence of an aggravated circumstance.

The latter two possibilities involve the difference between finding the existence of a statutory aggravating circumstance and finding no aggravated circumstance. In either event you could (p. 1222) recommend that the defendant be sentenced to life imprisonment.

Please note that, although you must unanimously agree to recommend life imprisonment, only the Forelady is required to sign either one of these two recommendations. They differ in the recommendation of sentence for the death penalty, because in that instance each juror, deliberating juror, must sign this form.

I will now instruct you on what you may consider in making your decision as to which sentence to recommend. As I previously instructed, if you find the existence beyond a reasonable doubt of a statutory aggravating circumstance, then you are permitted, but not required, to recommend the death penalty.

There are three conditions which you should consider in reaching your decision. First, whether the defendant has proven by any evidence the existence of a statutory mitigating circumstance. Second, whether the defendant has proven by any evidence the existence of any other mitigating circumstance. And third, whether for any reason you can think of, or for no reason at all, the defendant should be sentenced to life imprisonment.

(p. 1223) What is a statutory mitigating circumstance? It is a fact, an incident, a detail or an occurrence which the General Assembly of this state has declared by statute would reduce the severity of the offense of murder. In other words, it is a circumstance recognized by statute as one which, in fairness and mercy, may be considered as extenuating or as reducing the degree of moral culpability for the commission of the act of murder.

A mitigating circumstance is neither justification nor nor excuse for the murder. It simply lessens the degree

of one's guilt. That is, makes him less blameworthy or less culpable.

What statutory mitigating circumstances should you consider in this case? I am holding up the form which you will have in your jury room called statutory instructions. I refer once again to this sheet. Immediately below the listing of the statutory aggravating circumstances, which I read to you earlier, the text continues: "You may also consider the following statutory mitigating circumstance. One, the age and mentality of the defendant at the time of crime. Two, the defendant has no significant history of prior criminal conviction involving the use of violence against (p. 1224) another person. Three, the murder was committed while the defendant was under the influence of mental or emotional disturbance. Four, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

You may also consider any nonstatutory mitigating circumstances. A nonstatutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant claims serves the same purpose. That is, to reduce the degree of his guilt in the offense. While there must be some evidence which supports a finding by you that a statutory or nonstatutory mitigating circumstance exists, you need not find the existence of such a circumstance beyond a reasonable doubt.

In reaching your decision as to which sentence to recommend, you will weigh the aggravating and mitigating circumstances. While an aggravating iircumstance must be found before you can even consider recommending the

death penalty, once such finding is made beyond a reasonable doubt you may recommend the death sentence, even though you find the existence of a statutory mitigating circumstance. In other words, the existence of an (p. 1225) alleged statutory mitigating circumstance is not a bar to the imposition of the death penalty.

The third element you may consider, if you should conclude that a statutory aggravating circumstance exists, is whether the defendant should be sentenced to life imprisonment for any reason or for no reason at all. This is what has been traditionally referred to as a recommendation of mercy. And should such be your decision you would so indicate by returning to the Court whichever recommendation of life imprisonment form that is consistent with your finding.

Now let me again remind you that you will have two forms with you in the jury room dealing with a recommendation of life imprisonment. Should you decide to recommend that the defendant be sentenced to life imprisonment, you need not sign both. You must only sign one. One deals with the finding of—or the existence of an aggravated circumstance, and one deals with finding no aggravated circumstance.

In any instance, should you choose to recommend life imprisonment, your decision must be a unanimous one, and again only the foreperson would be required to sign either one of these two recommendation (p. 1226) forms.

Now, Madame Forelady, ladies and gentlemen of the jury, there is a legal theory in South Carolina which can be used in determining guilt called the hand of one is the hand of all. If certain persons are together, acting to-

kill, or intended to kill the victim Richard Haynes that you are required to bring in a verdict which calls for the imposition of the death penalty. You therefore must pay special attention to the totality of my charge on what your verdict alternatives are.

In this phase of the trial, Madame Forelady, ladies and gentlemen, you have heard about the defendant's past criminal record. I tell you that (p. 1228) proof of a prior criminal record on the part of the defendant should not be used to determine the existence of an aggravated circumstance. Such proof is admitted into evidence for the sole purpose of showing the defendant's character and no more.

Now, Madame Forelady, ladies and gentlemen, I will now summarize what I have just told you. You will have in your jury room during your deliberations four forms. One, recommendation of life in prison form with finding of the existence of an aggravating circumstance. Two, recommendation of life imprisonment form without finding the existence of an aggravated circumstance. Three, recommendation of death penalty form. And, four, statutory instructions.

The statutory instructions state the only aggravating circumstance you shall consider in this case. Should you fail to find beyond a reasonable doubt this circumstance existed at the time the murder was committed, then you would go no further. Your recommendation must be for life imprisonment. Should you find beyond a reasonable doubt the existence of an aggravated circumstance, you would then be authorized to consider recommending the death penalty.

(p. 1229) In your deliberations you will consider any statutory or nonstatutory mitigating circumstances which

gether, assisting each other in the commission of an offense, the law says under those circumstances the act of one is the act of all.

This legal theory is restricted to a determination of guilt. I purposefully did not instruct you in this regard during the guilt phase of this trial because the defendant was charged with capital murder. And if he was found guilty we would have to hold, as I previously explained to you, a separate or punishment phase of this trial in which the jury would have to determine the punishment.

I now want to instruct you emphatically that under a decision from the United States Supreme Court an accomplice in the commission of a felony in the course of which a murder is committed by others may not be subjected to the imposition of the death penalty if he does not himself kill, attempt to kill, or intend that a killing take place, or that lethal force be employed.

(p. 1227) The imposition of the death penalty in such a case is violative of the defendant's Eighth Amendment rights. The defendant's criminal culpability must be limited to his participation in the death of and criminal sexual conduct against the defendant, Richard Haynes.

Now, Madame Forelady, ladies and gentlemen, what I am saying to you is, in order for you to bring in a verdict in this phase of the trial which calls for the imposition of the death penalty, you must find beyond a reasonable doubt that the defendant, Demetrius Gathers, did himself kill, attempted to kill, or intended that the killing of Richard Haynes be accomplished.

I do not mean by this that should you find that the defendant Demetrius Gathers did in fact kill, attempted to

are supported by the evidence. You will weigh the aggravating circumstance you found against the mitigating circumstances, and you will then decide whether you will recommend the death penalty or life imprisonment. You may also consider any other factor in mitigation of the offense. And you can recommend a sentence of life imprisonment for no reason at all.

If you decide to recommend the death penalty, you will complete the proper form. You must write out the aggravating circumstance that you found. And all twelve deliberating jurors must sign the recommendation. Should you decide to recommend life imprisonment under either of the two possibilities that I have given you, the foreperson only must sign the appropriate recommendation. And no reason is to be given for your decision.

Whatever your recommendation is, it must be a unanimous one. That is to say, it must be the verdict of each and every juror.

In considering whether to recommend whether the defendant is to be sentenced to death or life imprisonment, I charge you that as jurors you must (p. 1230) decide the issue involved in this proceeding without bias and without prejudice to any party. You cannot allow yourselves to be governed by mere sympathy, by prejudice, by passion or by public opinion. Both the State and the defendant have the right to expect that each of you will carefully and impartially consider all the evidence in the case, and that you will follow the law as I have explained it to you.

• • •

DEFENSE COUNSEL OBJECTION

• • •

(p. 1234) Mr. Kent: In addition, Your Honor, we would like to note our objection to the State's argument to the jury concerning the prayer that was read. We believe that it's an appeal to passion and improper argument. We would move the Court for a mistrial of the penalty phase of this proceeding, or in the alternative, Your Honor, if the Court does not grant (p. 1235) us the mistrial, to remove that exhibit from the jury's consideration at this time.

The Court: Is it an exhibit in the trial?

Mr. Condon: Yes, Your Honor.

Mr. Kent: Yes, it is. It's part of the papers.

The Court: All right, sir.

• • •

OPINION OF THE
SOUTH CAROLINA SUPREME COURT
THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Demetrius Gathers, ... Appellant.

Appeal from Charleston County
Richard E. Fields, Judge

Opinion No. 22878
Heard March 8, 1988 - Filed June 6, 1988

AFFIRMED IN PART; REVERSED IN PART;
AND REMANDED

Assistant Appellate Defender Joseph L. Savitz, of the South Carolina Office of Appellate Defense, of Columbia; and Public Defender Joseph F. Kent, of Charleston for Appellant.

Attorney General T. Travis Medlock, Chief Deputy Attorney General Donald J. Zelenka, both of Columbia; and Solicitor Charles M. Condon, of Charleston, for Respondent.

GREGORY, C.J. Appellant was convicted of murder and first degree criminal sexual conduct and sentenced to

death. We affirm his convictions, reverse the death sentense, and remand for a new sentencing proceeding.

The victim, Richard Haynes, was a thirty-two-year-old black male. He was a self-proclaimed preacher and called himself "Reverend Minister." Haynes was attacked and killed by four black youths. He was stabbed in the stomach, beaten on the head with a bottle, and his rectum perforated by an umbrella inserted in his anus.

One of the four youths, Steven Hardrick, agreed to testify for the state in exchange for a guilty plea to misprison of a felony. Hardrick testified that he and three others, including appellant, came across the victim late one night at a park bench on a bicycle path. The victim was changing his clothes. Appellant and the victim exchanged some words and appellant then struck the victim in the face. Another youth, Zandall Hayes, also struck the victim. Appellant pinned the victim to the ground while a third youth, Dee Brown, kicked and beat him. They then smashed a bottle on the victim's head.

When the victim stopped moving, Hardrick nudged him with his foot. Hardrick, Brown, and Hayes then left the scene while appellant remained with the victim. The others looked back and saw appellant beating the victim with an umbrella. Hardrick saw appellant push the umbrella into the victim's anus. Appellant then rejoined the others. Appellant and Hayes, however, returned to the victim once more. Appellant said he stabbed the victim with a knife.

During the altercation, the youths rummaged through the victim's belongings and found two Bibles and various

religious articles. These articles were admitted into evidence at the guilt phase of trial.

Appellant confessed to his involvement in the murder but claimed Brown was the main aggressor.

GUILT PHASE

Appellant complains the solicitor injected an arbitrary factor into the jury's deliberation of guilt by attacking appellant's character when appellant had not put his character in issue. The solicitor stated:

> Let me first stop to point this out. Someone like Demetrius Gathers is not going to be talking about what he did to the minister over here at the Episcopal Church on the corner or the pastor at Morris Brown A.M.E. Church. Who is he going to be talking to: His own ilk. Who is that? Well, you have people out there like Rose Campbell; Jerome Heyward; James, known as Jeff, Carter. You had a chance to evaluate them. They weren't your sterling citizens that come forward after they heard about all this, but they did testify, and you did have a chance to hear what they had to say.
>
> What do all of them say, to a person? And why would they make this up? They all agree—again Steven Hardrick has been corroborated—that this defendant, this defendant along with Zandell Hayes, went back on that track after they left, just as Steven Hardrick told you. It's been corroborated and corroborated again. So it's just not Steven Hardrick's word.

The persons named by the solicitor are those who testified regarding what appellant said he had done to the victim. Appellant argues the solicitor's statements imply

appellant is a person of bad character by association. We disagree.

Taken in context, these remarks were not an improper comment on appellant's character. The solicitor's argument concerning the credibility of the State's witnesses is within the record and its reasonable inferences. *State v. Cockerham*, — S.C. —, 365 S.E.2d 22 (1988); *State v. Durden*, 265 S.C. 86, 212 S.E.2d 587 (1975). We find no error.

Appellant next contends the solicitor improperly disparaged the exercise of his constitutional rights and contrasted those rights with "the trial and execution" of the victim.

The solicitor's comments regarding appellant's rights to a lawyer and to remain silent are in reference to the voluntariness of appellant's confession, a factual issue submitted to the jury and therefore properly argued.

The solicitor also referred to appellant's right to confront witnesses and stated: "Contrast that in your mind's eye with the trial and the execution of Richard Haynes." This single comment does not rise to the level of prejudice found in *State v. Cockerham, supra*, where the solicitor's extensive comments constituted reversible error. In the context of the entire record, we hold any error harmless beyond a reasonable doubt. *State v. Cockerham, supra; see also State v. Bell*, 293 S.C. 391, 360 S.E.2d 706 (1987).

Next, appellant claims the trial judge should have *sua sponte* charged the jury on the defense of alibi based

on his first pre-arrest statement to police that he was not at the scene at the time of the murder. We disagree.

Appellant first stated he was at Rose Campbell's home at Starcastle Apartments from 9:30 p.m. until 1:00 or 1:30 a.m. the night of the murder. The record indicates the murder occurred between 10:00 to 11:00 p.m. on the bicycle path behind Starcastle Apartments. This pre-arrest statement was introduced into evidence by the State to show appellant changed his story when he later confessed to some involvement in the murder.

Appellant did not raise a defense of alibi at trial. In fact, his lawyer stated at the commencement of trial: "For the record . . . there will be no evidence of alibi." During closing argument, defense counsel further stated: "There is no question that he [appellant] was involved in beating him up."

In light of appellant's disavowal of an alibi defense, it was clearly proper that the trial judge did not charge alibi. Moreover, in view of the overwhelming evidence of appellant's guilt, we hold any error harmless beyond a reasonable doubt. *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985).

Next, appellant complains the trial judge improperly charged the jury on implied malice.

The trial judge charged the jury that malice may be implied from the intentional doing of an unlawful act where no excuse or legal provocation appears. This charge was proper. *State v. Crocker*, 272 S.C. 344, 251 S.E.2d 764 (1979). Appellant contends, however, the trial judge's charge requiring the jury to determine guilt or innocence

"based upon the evidence" impermissibly shifted the burden to appellant to prove an excuse.

This argument is without merit. Nowhere in the charge does the judge mention the need for rebuttal or explanation of the evidence presented by the State. Moreover, the judge's charge comports with the requirement that it is for the jury to determine from all the evidence whether or not malice is proven. *State v. Patrick*, 289 S.C. 301, 345 S.E.2d 481 (1986).

Appellant next contends his conviction for first degree criminal sexual conduct should be reversed because of an alleged violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). We disagree.

Pursuant to appellant's request for disclosure of evidence, the State provided an autopsy report prepared by Dr. Conradi. The report stated that the rectal wound was a contributory injury. At her meeting with defense counsel before trial, Dr. Conradi explained the sexual battery occurred "perimortem" or as death was occurring.

Appellant complains the State did not disclose evidence that Dr. Conradi equivocated as to whether the rectal wound was pre- or post-mortem at an early interview with a co-defendant's counsel. He contends this information would have allowed effective impeachment of Dr. Conradi at trial.

In determining the materiality of nondisclosed evidence, this Court will consider it in the context of the entire record. *State v. Osborn*, 291 S.C. 265, 353 S.E.2d 276 (1987). The State's failure to disclose information warrants a reversal as a *Brady* violation only if the omission

deprived the defendant of a fair trial. *Id.; State v. Thompson*, 276 S.C. 616, 281 S.E.2d 216 (1981); *see also U. S. v Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Appellant effectively cross-examined Dr. Conradi at trial and she conceded she had previously expressed an opinion she was unsure whether the rectal wound was before or after death. She further explained it was now her firm opinion the wound was pre-mortem. Because appellant has failed to show any prejudice from the alleged nondisclosure, we hold there was no error.

Accordingly, we affirm appellant's convictions for murder and first degree criminal sexual conduct.

SENTENCING PHASE

Appellant contends the solicitor's closing argument at the sentencing phase of trial violated *Booth v. Maryland*, 482 U.S. —, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), by focusing extensively on the personal characteristics of the victim. We agree.

The solicitor's argument included these remarks:

> We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there. . . . Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had his religious items, his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers cared little about the fact that he is a religious person. . . . But look at Reverend Minister Haynes' prayer. It's called "The Game Guy's Prayer." "Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this line-up. Play me anywhere you

> need me. I only ask you for the stuff to give you 100% of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me always to play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and to think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frame-up or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life." Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune. And he took things as they came along. He was prepared to deal with tragedies that he came across in his life.
>
> • • •
>
> Among the personal effects that this defendant could care little about when he went through it is something that we all treasure. It speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card. Reverend

> **Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers.**

In *Booth*, the United States Supreme Court held the victim's personal characteristics are not proper sentencing considerations in a capital case. 107 S.Ct. at 2535. The Court reasoned there is no justification for permitting a capital sentencing decision "to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." 107 S.Ct. at 2534. Moreover, it would would be impossible to provide the defendant "a fair opportunity to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant." 107 S.Ct. at 2535. The Court concluded the injection of the victim's personal characteristics into the sentencing determination violated the Eighth Amendment.

The solicitor's extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime. *Cf. State v. Bell*, 293 S.C. 391, 360 S.E.2d 706 (1987). These remarks conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter. Because the solicitor's remarks violated appellant's eighth amendment rights, we reverse the death sentence. *Accord State v. Gaskins, supra* (evidence of victim's bad character not admissible as mitigating evidence in sentencing phase).

We need not address appellant's remaining exceptions. Appellant's convictions are affirmed, the death sentence

reversed, and the case is remanded for a new sentencing proceeding.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED.

HARWELL, CHANDLER, FINNEY, JJ., and Acting Associate Justice J. B. Ness, concur.

Supreme Court, U.S.
FILED
DEC 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

versus

DEMETRIUS GATHERS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
SOUTH CAROLINA

BRIEF FOR PETITIONER

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PETITION FOR CERTIORARI FILED AUGUST 5, 1988
CERTIORARI GRANTED OCTOBER 11, 1988

QUESTIONS PRESENTED FOR REVIEW

I. DOES THE EIGHTH AMENDMENT PRECLUDE A PROSECUTOR'S COMMENTS DURING A CAPITAL MURDER PENALTY PHASE ON PERSONAL CHARACTERISTICS OF THE VICTIM WHERE THE CHARACTERISTICS ARE BASED ON EVIDENCE ADMITTED IN THE GUILT PHASE TO SHOW THE CIRCUMSTANCES OF THE CRIME?

II. DOES BOOTH v. MARYLAND, 482 U.S. __, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), PRECLUDE PROSECUTORIAL COMMENT DURING A PENALTY PHASE CLOSING ARGUMENT ON EVIDENCE INTRODUCED DURING THE GUILT PHASE OF THE TRIAL THAT REVEALS PERSONAL CHARACTERISTICS OF THE VICTIM?

III. WHETHER THIS COURT'S DECISION IN BOOTH v. MARYLAND, SUPRA, MISCONSTRUED THE REQUIREMENTS OF THE EIGHTH AMENDMENT AND WAS WRONGLY DECIDED?

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No. 88-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

versus

DEMETRIUS GATHERS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
SOUTH CAROLINA

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the South Carolina Supreme Court affirming in part, reversing in part, and remanding for a new sentencing proceeding was filed on June 6, 1988. The case is reported as State v. Demetrius Gathers, 295 S.C. 476, 369 S.E.2d 140 (1988), and is

reproduced in the Joint Appendix [J.A.] at pages 58-67. Judgment was entered and the remittitur sent to the Court of General Sessions of Charleston County, South Carolina, on June 20, 1988.

JURISDICTION

The Writ of Certiorari issued upon a Petition seeking review of an opinion of the Supreme Court of the State of South Carolina which was filed on June 6, 1988. The Petition for Writ of Certiorari was filed on August 5, 1988, and the Writ of Certiorari was issued October 11, 1988. Petitioner submits this Court has jurisdiction to review the judgment in question by Writ of Certiorari pursuant to 28 U.S.C. § 1257(3) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Eighth Amendment to the United States Constitution which provides: "Excessive bail shall not be

required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides: "Nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case involves prosecutorial argument in a penalty phase of a capital murder trial that commented upon non-objected evidence which was introduced in the guilt phase of the trial. The prosecutor's comment and guilt phase evidence revealed the personal characteristics of the victim at the time of the crime. The comment was held by the Supreme Court of South Carolina to violate the mandates of this Court's decision in Booth v. Maryland,

482 U.S.__, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), because it focused "extensively on the victim's character." (J.A. pp. 64-66).

I. State Court Proceedings:

Demetrius Gathers was indicted at the January 12, 1987, and March 2, 1987, terms of the Court of General Sessions for Charleston County, South Carolina, for murder and criminal sexual conduct first degree. The prosecutor served his statutory notice of intent to seek the death penalty on January 14, 1987. Gathers stood trial before a jury and the Honorable Richard E. Fields, Presiding Judge, from March 16 to March 21, 1987. He was convicted of the indicted crimes on March 20, 1987. On March 21, 1987, a penalty phase hearing was held before the same jury and judge, pursuant to South Carolina law. After hearing evidence in aggravation and

mitigation, the jury unanimously recommended that Mr. Gathers be sentenced to death by electrocution. In accordance with South Carolina law, the jury found beyond a reasonable doubt the statutory aggravating circumstance that the murder was committed while in the commission of criminal sexual conduct first degree. S.C. CODE ANN. Section 16-3-20(C)(a)(1)(a) (1987 Supp.). Judge Fields sentenced Gathers to death in accordance with the jury's decision. S.C. CODE ANN. Section 16-3-20 (1987 Supp.).

Mr. Gathers appealed his sentence and conviction to the South Carolina Supreme Court, pursuant to S.C. CODE Section 16-3-25 (1987 Supp.). After briefing and oral argument, the Supreme Court of South Carolina issued its Opinion on June 6, 1988, affirming the convictions, reversing the death

sentence and remanding for a new sentencing hearing. State v. Demetrius Gathers, 295 S.C. 476, 369 S.E.2d 140 (1988). In the opinion, the Supreme Court of South Carolina concluded that the solicitor's closing argument at the sentencing phase of the trial violated Booth v. Maryland, 482 U.S. __, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), by focusing extensively on the personal characteristics of the victim. (J.A. p. 64). Particularly, the Supreme Court stated:

> The solicitor's extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime .... These remarks conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter. Because the solicitor's remarks violated appellant's eighth amendment rights, we reverse the death sentence.

(J.A. p. 66).

The Petitioner petitioned for certiorari to this Court raising the three questions for review addressed herein. Certiorari was granted October 11, 1988.

II. Pertinent Facts from the Trial.

The victim, Richard Haynes, a thirty-two year old black male was a self-proclaimed preacher who referred to himself as "Reverend Minister." (J. A. p. 6, Tr. p. 564). Around 10:15 p.m., on Saturday, September 13, 1986, Mr. Haynes left his parents' house for a walk on a bicycle path in a city park in Charleston, South Carolina. (J.A. pp. 5, 7). He carried with him various religious items, including Bibles, rosaries, statues, and various religious tracts such as the "Game Guys Prayer." During the trial, his mother, Dorothy Louise Haynes, testified that he carried his religious items and talked to people

all the time about the Lord. (J.A. p. 5). She also testified that he had mental problems over the last two years, but there had not been any problems in terms of violence. (J.A. p. 4).

On that evening, Mr. Haynes went to a park bench. According to the testimony of Esdavan Hardrick, the Respondent, Demetrius Gathers, along with his confederates, came upon the victim who was changing his clothes and tried to engage him in some conversation. (J.A. pp. 17, 32). Sitting out on the bench were the Bible and some paper religious tracts. (J.A. pp. 26-27). Gathers started talking with Haynes who stated that he did not want to talk to him at the time. (J.A. p. 18). Gathers struck the victim initially with his fist and the victim fell into another confederate Zandell Hayes and the victim "went wild." (J.A.

pp. 18-19). Hayes hit the victim and then Gathers and the victim continued tussling up the path on the ground. (J.A. p. 20). Haynes was eventually pinned to the ground and kicked and hit by a third confederate Dyonzoria Brown. (J.A. p. 21). Brown picked up a bottle and struck Haynes in the head twice. (J.A. pp. 21-22). Then Gathers picked up the bottle and hit the victim about three times in the head with the bottle until it broke while the victim was saying, "Oh, Lord," twice. (J.A. p. 22). The victim then fell unconscious and Hardrick and Hayes left. (J.A. p. 22).

Hardrick testified that he and Gathers looked through Haynes' belongings, including his bags, looking for something to steal. (J.A. pp. 26-27). When Gathers was going through them, he started throwing things

everywhere, while the victim was still on the ground. (J.A. p. 27). As the Supreme Court of South Carolina held, during the altercation, they rummaged through his belongings and found two Bibles and various religious tracts. These articles were introduced into evidence at the guilt phase of the trial without objection.

Gathers was still hitting the victim while the others left. (J.A. p. 23). Testimony was that he was striking the unconscious victim with an umbrella at this time about his back and head. (J.A. p. 23). According to Hardrick, he saw the victim's pants down to about his thighs and Gathers then used the top end of the umbrella and stuck it up the victim's anus while Haynes was groaning. (J.A. pp. 24-26).

After Gathers had inserted the umbrella, they left the scene and went

to a nearby apartment complex. (J.A. p. 29). Gathers showed them a knife. (J.A. p. 29). Later they started to return to the bike path, but Hardrick and Brown did not go. Gathers and Zandell Hayes went back to the victim. Upon returning, Gathers said that he had stabbed the victim. (J.A. p. 30).

During the guilt phase of the trial, the victim's mother, Reverend Dorothy Haynes, testified that her son had in his possession on the night of the murder various items including two Bibles, a plastic statue, rosary beads, olive oil, and a card on which was written "The Game Guy's Prayer." (J.A. pp. 8-10). Defense counsel affirmatively noted that he had "no objection" to the evidence being introduced. (J.A. pp. 8-10). Reverend Haynes also testified in the guilt phase that her son had mental problems and had

been in and out of the mental hospital three times in about two years. (J.A. pp. 4-5). pp. 561-563).

Officer Hazel of the Charleston City Police testified that upon arriving at the scene, he found the Bibles, the angel and personal papers laying to the right next to the body. (Tr. pp. 787-788). These items were admitted without objection of defense counsel. (Tr. pp. 786-787). No question has ever been raised that the introduction of these items was probative as reflecting Haynes' possessions that the perpetrators reviewed for stealing during the guilt phase. See (J.A. pp. 27-28).

During the guilt phase, forensic evidence was presented that revealed fecal material on the tip of the umbrella that was introduced at trial. (Tr. p. 765). Also, hair fibers

consistent with the victim's were found on the umbrella. (Tr. pp. 754-755). The forensic pathologist, Dr. Sandra Conradi, testified that the lacerations on the face were consistent with being struck with the umbrella and the injury to the face consistent to being struck with a fist or bottle. (Tr. pp. 980, 983). The stab wound to the abdomen, a pre-mortem injury was also consistent with a knife blade. (Tr. p. 984). She further testified that the rectal injury was pre-mortem. (Tr. pp. 987-988). She gave her opinion that the cause of death was a homicide caused by a combination of factors. (Tr. p. 989). These factors were the bleeding from the head and scalp wounds, the vomitus in his airways, pain and suffering causing cardiac irregularities, and fat emboli in his lung. (Tr. pp. 989-990). On cross-examination, Dr. Conradi testified

that she could not state whether the stab wound to the stomach or the rectal injury occurred last in time, but that they each occurred after the head injury. (Tr. pp. 1013-1014).

The jury convicted Gathers of murder and criminal sexual conduct first degree. In the penalty phase, the state introduced all testimony from the guilt phase expressly without objection from the defense counsel. (Tr. p. 1167). Solicitor Condon also introduced into the record a stipulation of Gathers' prior criminal history. (Tr. p. 1167). In mitigation, Gathers presented testimony attempting to impeach the forensic pathologist's opinion as to when the anal injury occurred. (Tr. pp. 1169-1175). Also, Gathers' mother testified for mercy because he was a nice boy and was always helping people and doing things. (Tr. pp. 1182-1183).

The defendant's cousin testified about his family being a single parent family and his sisters' employment and educational status. She testified that his oldest sister Elvira was twenty - three years old living in Detroit and employed by the Highway Department and Gathers' brother, Mark Simmons, was thirteen years old. (Tr. p. 1186). Further, she testified that Ellena lived with her mother and was unemployed but attended a technical education school. Gathers' youngest sister was a fourteen year old high school freshman who also lived with her mother. (Tr. p. 1187). She also testified that the defendant was an affectionate child and close to her son. (Tr. p. 1187). She claimed that his criminal problems developed from "other people telling Demetrius what to do when his mother told him what not to do. (Tr. p. 1188).

Gathers' sixth grade school teacher, Mary Sistrunk, testified that Gathers was not one of her brighter students and she had "to force him to get what I want done." (Tr. p. 1191). She described him as an introvert, a follower, who wanted approval as a typical boy. She testified that he did not cause many problems. (Tr. p. 1193). His sister, Ellena, testified about how she felt about her brother. (Tr. pp. 1198-1199). She testified that they had always been close, that he had always been a loving, caring person not to her but to a lot of people. (Tr. p. 1199). She said he had "always been honest with" her and was her "rock." (Tr. p. 1199). Further, that many days he helped her, "but he has always been there." (Tr. p. 1199). In conclusion, she asked the jury to let him live. (Tr. p. 1199).

The Solicitor then began his closing argument on the law and the mitigating circumstances that the defense presented and told the jury to "look at the individual characteristics of this defendant and the crime." (J.A. p. 39). (Tr. p. 1205). The Solicitor described the heinous brutality that occurred on the evening of Mr. Haynes' murder. Particularly, he stated:

> And you will have the exhibits to think about what happened out there. You will have some exhibits in there that will tell you, tell you what your decision must be in this case, although it's not pleasant. We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there. This defendant strew them across the bike path, thinking nothing of that. Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had his religious items, his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person. Cared

> little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks.

(J.A. p. 41). The prosecutor then read the card called "The Game Guy's Prayer" to the jury that was in evidence. (J.A. p. 42). He further commented that another item the defendant went through of the victim's was a voter registration card. (J.A. p. 43). He stated that Haynes believed in his community and that "you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers." (J.A. 43). The Solicitor concluded that "the proper verdict, the only verdict, in this case is death." (J.A. p. 44). No objection or request for any curative instruction was made during the argument.

Defense counsel Sandlin then argued for the jury to continue to "demonstrate

your high regard for human life." He urged the jury to remember that "Ricky Haynes is a victim and a victim I don't want you to forget ... [and] the clear implication is that he was a Christian." (J.A. p. 45). Further, he argued for the jury "to think about what the implications of that Christian faith were and are and will be in the future." (J.A. p. 45). He urged compassion and mercy and suggested that the question was "where will the pain end? The pain for society, the pain for the victim's family, and the pain for the family of the defendant?" (J.A. p. 46). (Emphasis added). He concluded that they were only "answerable to God" and "blessed are the merciful." (J.A. p. 46).

The trial court entered in its penalty phase instructions to the jury to guide its decision-making. (J.A. pp.

46-56). During the instructions, the trial court emphasized that "the defendant's criminal culpability must be limited to his participation in the death and criminal sexual conduct against the defendant, Richard Haynes." (J.A. p. 54). At the conclusion of the instructions, the trial court stated:

> [Y]ou must decide the issue involved in this proceeding without bias and with prejudice to any party. You cannot allow yourselves to be governed by mere sympathy, by prejudice, by passion, or by public opinion. Both the State and the defendant have the right to expect that each of you will carefully and impartially consider all the evidence in the case, and that you will follow the law as I have explained it to you ....

(J.A. p. 56). After the charge was given to the jury, the defense counsel stated that he would note, for the first time, "our objection to the State's argument to the jury concerning the prayer that was read. We believe that it's an appeal to passion and improper

argument." (J.A. p. 57). Counsel moved for a mistrial, or in the alternative, to remove the exhibit from the jury's consideration. The motion was denied. After approximately two hours' deliberations, the jury returned their verdict finding the statutory aggravating circumstance of murder was committed while in the commission of criminal sexual conduct in the first degree and recommended that Gathers be sentenced to death by electrocution. (Tr. p. 1246). After the jury was polled, the trial court sentenced Gathers to death for murder and thirty (30) years consecutive for criminal sexual conduct. (Tr. p. 1260).

SUMMARY OF THE ARGUMENT

The Eighth Amendment does not preclude consideration by a sentencing jury of evidence related to the circumstances of the offense, even though such characteristics may reveal personal characteristics of the victim. Similarly, there can be no constitutional violation by a prosecutor's comment on this properly admitted evidence that gives the jury a glimpse of the life a capital defendant chose to extinguish. Such evidence and comment is relevant in a sentencing proceeding because it relates to the harm caused by the defendant to the victim and the individual circumstances of the crime. Where virtually no limits are placed upon evidence about the personal characteristics of the defendant, such evidence about the victim, obvious from the crime itself,

is useful to assess the defendant's moral culpability and blameworthiness, especially when a defendant was in a position to know of these characteristics prior to his final assault on the victim. To the extent that Booth v. Maryland, supra, precludes such comment, it should be re-examined and overruled or modified as an incorrect statement of the requirements of the Eighth Amendment.

Further, the decision of the South Carolina Supreme Court misconstrued Booth v. Maryland, supra, which allowed comment under evidence that revealed victim characteristic- from evidence of the crime. The type of information found violative in Booth is readily distinguishable from the comment in the instant case. The test should not be whether the prosecution comment was unnecessary for an understanding of the

circumstances of the crime where the evidence of the characteristics were obvious to a juror, but rather whether they relate to the circumstances of the crime. Under this situation, the comments should require a new sentencing hearing only when they deprive the defendant of a fundamentally fair sentencing proceeding. In the instant case, considering the evidence, the arguments, and the instructions as a whole, the defendant's Eighth Amendment rights were not violated. The prosecution in a capital case is not required to treat the victim as a mere abstraction to the sentencing process. The South Carolina Supreme Court's decision to the contrary must be reversed.

ARGUMENT

I. The Eighth Amendment does not preclude prosecutorial comment on a victim's personal characteristics related to a capital crime.

The Eighth Amendment does not preclude comments in a penalty phase of a capital murder trial by the prosecutor that are directly related to the circumstances of the crime. In Booth v. Maryland, 482 U.S.__, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), this Court generally stated that a particular victim impact statement introduced at the sentencing phase of a capital murder trial violated the Eighth Amendment. This Court noted, however, personal characteristics of the victim "may well be admissible because they relate directly to the circumstances of the crime." Booth, supra, 107 S.Ct. 2535, n. 10.

In the instant case, the victim, Richard Haynes, a self-proclaimed

minister was at a park bench in the evening hours in Charleston, South Carolina. (J.A. pp. 26-27). While changing his clothes and displaying his religious tracts, including a Bible and angel statues, he was met by Demetrius Gathers and his roving gang. (J.A. pp. 16-18, 26-27). After a brief conversation, Gathers struck the victim in the face just with his fist, then with a bottle, then with an umbrella, and later with a knife. (J.A. pp. 18-19, 22, 23, 30). Gathers went through the victim's belongings, including the religious materials and started throwing the materials around while looking for something to steal before he struck the victim with the umbrella. (J.A. pp. 27-28). Two Bibles, the angel, and religious cards were found laying next to the victim's body. (Tr. pp. 787-788). Included among the materials

at the scene was a voter registration card and a card with "the Game Guy's Prayer." [Tr. p. 782 (State Exhibit 19), p. 787 (State Exhibit 15)]. These items were received in evidence in the guilt phase without objection by the defense counsel. Also, while being beaten by Gathers, the defenseless victim was described as going "wild." (J.A. p. 19). Testimony from his mother also revealed the victim had a recent history of mental problems but was non-violent. (J.A. p. 4).

This evidence of the crime revealed certain evidence, obvious to Gathers during the commission of the offense, which the prosecutor discussed in his penalty phase argument. We submit that the Eighth Amendment does not require a state to redact and neutralize the victim from the trial when the properly admitted evidence reveals personal

characteristics of the victim such as religious practices at the time of the crime, his mental or physical deficiencies which may have caused him to be unable to protect himself from the malicious perpetrators, and various items, which the perpetrators rejected as not worthy of theft, that were maliciously strewn around his body during the event. Is this information relevant to the circumstances of the crime or reveal certain personal characteristics of the defendant, Demetrius Gathers? We submit that it is and therefore could be subjected to permissible argument by the prosecutor.

In a capital murder case, the sentencer "does not attempt to decide whether particular elements have been proved, but instead makes a unique, individualized judgment regarding the punishment that a particular person

deserves." Zant v. Stephens, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring). In California v. Ramos, 463 U.S. 992, 1008 (1983), the Court explained:

> In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In facing a penalty, however, there is no similar 'central issue' from which the jury's attention may be divested. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury ..., the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized.

As this Court has consistently held, the factors considered by the capital sentencer must include "the character and record of the individual offender and the circumstances of the particular offense." Woodson v. North Carolina,

428 U.S. 280, 304 (1976). (Emphasis added).

The circumstances of the offense should include who the victim was and what he was doing when the crime occurred. These factors are related to the Eighth Amendment concept of proportionality that requires "that the penalty imposed in a capital case be proportional to the harm caused and the defendant's blameworthiness." Enmund v. Florida, 458 U.S. 782, 823 (1982) (O'Connor, J. dissenting).

In this proceeding, unlike Booth, the comments did not focus on the reputation of the victim and the effect on his family, but the circumstances of the crime over which the defendant had control, the apparent choice of a vulnerable victim. The defendant may choose, or decline, to premeditate, to act callously, to attack a vulnerable

victim, to commit a crime while on probation, or to amass a record of offenses. Booth v. Maryland, supra, 107 S.Ct. at 2534, n. 7 (1987). Certainly evidence of the characteristics of a victim that reflects his vulnerability that came from evidence of the offense are appropriate in an Eighth Amendment analysis.

Here, the victim's slight build, his open vulnerability by preaching to any person, his mental problems, and his location in the park with his religious items in the evening additionally reflect the character of the defendant who made his choice to attack this victim while learning these matters during the vicious attack. This is not the type of evidence of personal qualities of a victim, such as standing in the community, that the Eighth Amendment was concerned with. This

evidence and comment were not sought to be rebutted, but rather were relied upon by the defense as a shield from the death penalty in their closing argument when they asked the jury what the victim and his Christianity would ask them to do concerning taking another's life. (J.A. p. 45).

The Respondent has argued before this Court that because the victim, who they came upon at night, was a stranger to Gathers prior to the incident weighs against the Petitioner's argument. The Respondent fails to recognize certain salient facts that permitted this comment. During the crime, it could reasonably be inferred from the evidence that the defendant obviously learned of his apparent religious practice by the items on the park bench, his talk with the victim, and by his viewing of the items looking for something to steal

during the assault, but before he had beaten the victim with the umbrella or stabbed him with the knife. (J.A. pp. 18, 24, 26-28). This was not the situation that concerned the author of Booth about when a defendant often will not know the victim or the characteristics of the family of the victim. Booth, supra, 107 S.Ct. at 2534. To redact this information from the penalty phase or the argument would make the victim, Richard Haynes, a mere abstraction to the crime itself. The Eighth Amendment, we submit, requires otherwise.

The prosecution's comments, based upon evidence relating to the circumstances of the crime which had been introduced before the same jury, unlike the Booth situation, contained no reference to the residual effect the murder had upon the victim's family or

upon the community, nor did it convey to the jury the opinions of the victim's family concerning the crime, the defendant, or the appropriate punishment. "At most, this thumbnail sketch ... gave the jury a quick glimpse of the life [respondent] chose to extinguish." Mills v. Maryland, 486 U.S.__, __, 108 S.Ct. 1860, 1876, 100 L.Ed.2d 384, 408 (1988) (Rehnquist, C.J., dissenting). Accord Daniels v. State, 528 N.E.2d 775 (Ind. 1988) (prosecution's remarks referring to personal information about the victim adduced from guilt phase evidence is proper). Moon v. State, No. 45722, __S.E.2d__ (Ga., November 30, 1988) (no Booth violation where facts about victim properly developed during the trial was the subject of the prosecution argument). Brooks v. Kemp, 762 F.2d 1383, 1409 (11th Cir. 1985); Kordenbrock

v. Scroggy, 680 F.Supp. 867 (E.D. Ky. 1988) (Booth not intended to reach a closing argument where the jury is reminded that crimes have victims who are persons who have families); State v. Rice, 757 P.2d 889, 906 (Wash. 1988) (jury should be allowed to consider the crime's impact on the victims and argument on that topic is proper to the extent that it is restricted to the circumstances of the crime).

In this regard, the California Supreme Court's analysis is particularly appropriate:

> [A]t the penalty phase the jury decides a question the resolution of which turns not only on the facts but on the jury's moral assessment of those facts as they reflect on whether defendant should be put to death. It is not only appropriate, but necessary, that the jury weigh the sympathetic elements of the defendant's background against those that may offend the conscience. In this process, one of the most significant considerations is the nature of the underlying crime.

> Hence, assessment of the offense from the victim's viewpoint would appear germane to the task of sentencing.

People v. Haskett, 640 P.2d 776, 790 (Cal. 1982). See also People v. Hovey, 749 P.2d 776, 795 (Cal. 1988) (prosecutor's remarks did not violate Booth where confined to matters obvious to any juror). The Eighth Amendment should not require a different approach by prosecutors, especially in response, as here, to the defense's effort in mitigation to present the defendant and his family as suffering persons.

The decision of the South Carolina Supreme Court may prohibit the use of such relevant information from being used where it underscores the gravity of this offense. Justice White correctly stated that "the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled

to put in, see, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982), by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." Booth, supra, 107 S.Ct. 2540 (White, J., dissenting).

Similarly, Justice Scalia stressed this same distinction in his dissent in Booth:

> To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to proscribe a debate of the appropriateness of the capital penalty with one side muted. If that penalty is constitutional, as we have repeatedly said it is, it seems to me not remotely unconstitutional to permit both the pros and cons in the particular case to be heard.

Booth, supra, 107 S.Ct. at 2542 (Scalia, J., dissenting). In his dissent in Mills v. Maryland, supra, Chief Justice Rehnquist, while stating that he did not interpret Booth as foreclosing the introduction of all evidence, in whatever form, about a murder victim, reasserted that "if a jury is to assess meaningfully the defendant's moral culpability and blameworthiness, one essential consideration should be the extent of the harm caused by the defendant." Mills v. Maryland, supra, 486 U.S. at __, 108 S.Ct. at 1876, 100 L.Ed.2d at 408. To the extent that Booth is determined not to allow this consideration or argument, we submit that it was wrongly decided. Here, the evidence from the guilt phase and the prosecutor's comment related to factors about which the defendant was aware and, hence, were arguably relevant to his

decision to kill. Compare Booth, supra, 107 S.Ct. at 2534, with People v. Spreitzer, 525 N.E.2d 30, 44-45 (Ill. 1988). See also Preston v. State, 531 So.2d 154, 160 (Fla. 1988); State v. Cummings, 323 N.C. 181, 372 S.E.2d 541 (1988); State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983); State v. Colvin, 314 Md. 1, 548 A.2d 506 (1988) (victim briefly described and photograph in life presented); Gilmore v. Armontrout, No. 88-1378, __F.2d__ (8th Cir. Nov. 10, 1988); Bryne v. Butler, 845 F.2d 501, 510-512 (5th Cir. 1988); Hayes v. Lockhart, 852 F.2d 339 (8th Cir. 1988); Evans v. Thigpen, 683 F.Supp. 1079 (S.C. Miss. 1987); Blanco v. Duggar, 691 F.Supp. 308, 322 (S.D. Fla. 1988).

In this case, as reflected by the mitigation evidence, as in all death penalty cases, virtually no limits are placed on the mitigating evidence a

defendant may introduce concerning his own history and circumstances, yet the State, under Booth may be precluded from demonstrating similar characteristics, relevant to the crime, and how or why the victim placed himself in a vulnerable position. If a jury is to access the defendant's moral culpability and blameworthiness, one consideration must be information about the murder victim. If this information also reflects the extent of the harm caused by the crime on the family or society as a whole, it should not be error. Similarly, if a victim was the President, a mayor, or a police officer whose loss clearly affected society, the fact of the jury's knowledge of this status should not be seen as an Eighth Amendment violation when it is brought to a jury's attention by evidence from the circumstances of the crime.

Clearly, when a defendant, as here, is reasonably aware of the personal characteristics at the time of the crime, the time of his selection of the victim, there is no constitutional violation. The prosecution is not required under the Eighth Amendment to stand mute when these facts are in the record to assess the defendant's blameworthiness and moral culpability. It speaks of the defendant and of the appropriate punishment the law demands.

II. The decision of the South Carolina Supreme Court misconstrued Booth v. Maryland, supra.

The South Carolina Supreme Court held that Booth v. Maryland, supra, was violated because the Solicitor generally commented on evidence presented earlier that the victim was a small, religious person with mental problems who

possessed a voter registration card. These comments were derived from expressly non-objected guilt phase evidence from his mother about his leaving the house with his religious materials as a self-proclaimed minister who "talks to people all the time about the Lord" ard the immediate circumstances of the crime when he was brutally killed while in a park with his religious items laid out on a park bench and his possessions subsequently scattered around him while the perpetrators looked for something to steal before he was murdered. (J.A. pp. 4-5, 26-28). The Solicitor's direct reference in closing argument to this admitted evidence which necessarily revealed information about the victim's and defendant's characteristics did not violate Booth v. Maryland, supra. The South Carolina Supreme Court's apparent

extension of Booth to such an argument was in error.

In Booth v. Maryland, supra, the plurality of the Supreme Court stated that their general disapproval of statutory victim impact statements does not mean this type of information will never be relevant. "Similar types of information may well be admissible because they relate directly to the circumstances of the crime." Booth, supra, 107 S.Ct. 2529, n. 10. More recently in Mills v. Maryland, supra, the dissent found no Booth violation in introduction of evidence that revealed "a thumbnail sketch of the victim's difficult childhood and frequent encounters with correctional authorities."

Clearly, the information present here was not the same type of information presented on the Victim

Impact Statement in Booth. There, the Victim Impact Statement included information from family members on the character and reputation of the victims and their status in the community. The Victim Impact Statement further related the problems the victim's family members were having with the deaths. This is a far cry from the situation here where the information now complained of directly bears upon the crime and its motive.

Here, the fact that the victim was religious was directly connected to a circumstance of the crime -- his apparent study (or preaching) of his religious beliefs when he was accosted. Further, his mental problems directly related to his vulnerability at the hands of the gang of perpetrators that came upon him that night. The voter registration card was another item

rejected by the defendant after they had scattered his belongings looking for something to steal, after striking him unconscious, while the victim sought peace of mind in the city park.

In Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974), this Court stated that "a court should not lightly infer that a prosecutor intended an ambiguous remark to have its most damaging meaning." Here, the South Carolina Supreme Court's analysis of Booth could be seen to inappropriately require the prosecutor to sanitize and redact any characteristics of the victim from the case for fear that the evidence could be seen to be arbitrary. If it is correct that whether it is error to comment that a victim was small and religious when he was attacked by four perpetrators after he was apparently practicing his religion, it is a logical next step that

comments that a burglary victim lived alone and was elderly and weak would be similarly infirm. The Constitution does not require that conclusion.

Unlike the "sterling member of the community" comparison decried in Booth that had little nexus with the crime, here the characteristics evolved out of the crime itself. Simply put, it was the state's theory of the case that the motive and reason that Ricky Haynes was assaulted and murdered was because he was a vulnerable and likely victim suffering from some mental disability who was willing to talk to people all the time about the Lord from the park bench until the heinous brutality inflicted by Demetrius Gathers occurred.

The Eleventh Circuit in Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (en banc), vacated on other grounds in Kemp v. Brooks, __U.S.__, 106 S.Ct. 3325, 92

L.Ed.2d 732 (1986), stated:

> While argument focusing on the victim can be dangerous, not all prosecutorial references to the victim are improper. The fact that there is a victim, and the facts about the victim properly developed during the course of the trial, are not so far outside the realm of 'circumstances of the crime' that mere mention will always be problematic. It is not necessary that the sentencing decision be made in a context in which the victim is a mere abstraction.

762 F.2d 1409. The South Carolina Supreme Court's restrictive reading of Booth requires a new sentencing when there are extensive comments as the victim's character that "were unnecessary to an understanding of the circumstances of the crime." The test in Booth is not whether the prosecutor's comments were "unnecessary" for an understanding of the crime in light of other evidence, but rather whether "they relate directly to the circumstances of the crime." Booth, supra, 107 S.Ct.

2529, n. 10. The state court's interpretation of Booth is in error and demands vacation.

In Booth, the Court was apparently careful to stress that personal characteristics of a victim may well be admissible where such information related to the circumstance of the crime and was supported by the evidence. While Booth did not discuss the precise issue of prosecutorial comment on the evidence, we submit that the appropriate test for such comment would be under the teachings of this Court in Donnelly v. DeChristoforo, supra, and Darden v. Wainwright, 477 U.S. 168 (1986), as to whether the comments so infected the trial with unfairness as to make the resulting conviction [sentence] a denial of due process." Booth clearly involved much more than argument about the personal characteristics of the victim.

Even a cursory comparison of the Victim Impact Statement permitted before the jury in Booth and the comments of the prosecutor in the instant case reveal a wealth of difference in the scope, tone, and effect of the information provided. The focus of Booth was on the information that described the effect of the murder and bereavement on the family and friends of the victim and contained their opinion and characterizations of the crime itself. The Victim Impact Statement was very detailed and focused in graphic detail on how the family members' lives had been altered by this incident.

The same cannot be said of the prosecutor's comments. The prosecutor did focus on the victim as a religious person and the possessor of a voter registration card. While this comment in other cases under Booth may be

considered to be error, here it clearly was not because it related to the criminal event itself. The uncontradicted fact that the victim was at the park bench with his religious materials set out spoke volumes about the character of a defendant who would brutalize that solitude. The uncontradicted fact that the defendant scattered the personal possessions of the victim, including his religious cards and voter registration card, looking for something of value to him to steal after he had assaulted the victim before the final blows, speaks to the blameworthiness of the same defendant. These facts were inextricably tied to the circumstances of the case and should be the subject of permissible comment under the Eighth Amendment. This is especially true in a case where the defense counsel attempted to use the

victim's religion as a shield before the jury from the death penalty. (J.A. p. 45). ("I ask you to think about what the implications of that Christian faith were and are and will be in the future.")

Additionally, the Donnelly analysis requires that the solicitor's closing argument be viewed as a whole along with the jury instructions. Here, the solicitor generally stated that the decision for life or death should not be based on sympathy for the victim but "you look at the mitigating and aggravating circumstances. You look at the individual characteristics of this defendant and the crime." (J.A. p. 39). During the penalty phase instructions to the jury, the trial court stated "the defendant's criminal culpability must be limited to his participation in the death and criminal sexual conduct

against the defendant, Richard Haynes." (J.A. p. 54). Finally, the trial court admonished the jury that "you cannot allow yourselves to be governed by mere sympathy, by prejudice, by passion, or by public opinion." (J.A. p. 56). Far from requiring the jury to focus on extraneous issues, the trial court directed the jury's attention to the defendant and his crime and instructed them to ignore the unguided passion and prejudice. While under Booth, supra, some prosecutorial references to a victim's family or character may be improper, the comments in this case clearly did not render his trial fundamentally unfair.

Because the death penalty is qualitatively different from all other punishments, "there is a corresponding difference in the need for reliability in the determination that death is the

appropriate punishment." Woodson v. North Carolina, supra, 428 U.S. at 305. The procedures must comport with the Eighth Amendment's prohibition against cruel and unusual punishment, which, in the capital sentencing context, requires that sentencing discretion "be suitably directed and limited so as to minimize the risk of wholly arbitrary or capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976). But capital sentencing is still an emotional issue and necessarily will always be so. Barclay v. Florida, 463 U.S. 939 (1983). ("It is entirely fitting for the moral, factual and legal judgment of judges and juries to play a meaningful role in sentencing.") Empathy for a defendant's individual characteristics or revulsion at the moral affront of his crime, reactions accepted as bases for capital sentencing decisions, are not

susceptible to full explanation without recourse to human emotion. Nor can reason alone fully explain the reaction of a juror upon hearing the facts of a particular crime described in their tragic detail. The fact that an argument by the prosecutor or the defense counsel has emotional overtones does not independently indict it as improper. The propriety of the argument rests primarily in the relation of its content to issues relevant to the sentencing jury's concern.

Here, the South Carolina Supreme Court found alleged Eighth Amendment error by the prosecutor's comments in the penalty phase about the victim's religious practices and his possession of a voter registration card. Taken to its logical extension, the decision would require the prosecutor to remove this evidence from the case itself

presented in the guilt phase. The simple fact that Richard Haynes, a self-proclaimed minister, with his Bible, rosary beads, statues, and religious tracts was at a park bench on the evening of his death was evident to the defendant and to the jury both in the guilt phase and the penalty phase. The simple fact that Gathers scattered these items, including a voter registration card, looking for items valuable to him prior to the murder, was evident to the defendant and the jury at each phase of the trial.

To accept the lower court's logic would require that a jury be instructed not to consider any personal characteristics of the victim that may contrast with the personal characteristics of the defendant. The Eighth Amendment does not require such redaction and Booth v. Maryland, supra,

should not be so interpreted as requiring it. In Zant v. Stephens, 462 U.S. 862, 885 (1983), this Court made clear that the jury, in its punishment decision, may properly consider any information about the individual defendant and his offense. Accord Barclay v. Florida, supra. The fact of a victim's circumstances at the time of the offense--being in a store, a church, a political gathering, or at a park--or a victim's unique status known to a defendant before the final blow is struck--the President, a judge, a policeman, or a street minister--or his physical condition--elderly, weak, disabled, or healthy--are circumstances that are obvious from the circumstances of a crime. Because such characteristics are obvious to a juror from the evidence in the case, prosecutorial comment may not be

"necessary" to prove the circumstances of the crime. The Eighth Amendment, however, does not preclude such comment based upon the obvious evidence related to the crime. It is not necessary that the sentencing decision be made in the context that the victim is a mere abstraction. The decision of the South Carolina Supreme Court to the contrary must be reversed.

CONCLUSION

For the foregoing reasons, the State of South Carolina requests this Court to reverse the decision of the Supreme Court of South Carolina and remand the matter for further proceedings not inconsistent with the decision.

Respectfully submitted,

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No. 88-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

versus

DEMETRIUS GATHERS,

Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Brief for Petitioner on the Respondent by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to William Isaac Diggs, Esquire, 1122 Lady Street, Suite 301, Columbia, South Carolina 29201. He further certifies that all parties required to be served have been served.

This 9th day of December, 1988.

Donald J. Zelenka

SWORN to before me this
9th day of December, 1988.

(LS)
Notary Public for South Carolina
My Commission Expires: 4-18-95.

No. 88-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

versus

DEMETRIUS GATHERS,

Respondent.

AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and forty copies of Brief for Petitioner in the above captioned case by depositing same in the U. S. Mail, first-class postage prepaid, and properly addressed to the Clerk of this Court.

This 9th day of December, 1988.

Donald J. Zelenka

SWORN to before me this
9th day of December, 1988.

(LS)
Notary Public for South Carolina
My Commission Expires: 4-18-95.

Supreme Court, U.S.
FILED
DEC 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-305 (9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SOUTH CAROLINA,

Petitioner,

v.

DEMETRIUS GATHERS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

MOTION TO DISMISS

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16 pp

Comes now, Demetrius Gathers, by and through his undersigned counsel who would request of this Court a dismissal of the Petition for Writ of Certiorari as a result of a fatal procedural default committed by the State of South Carolina. Petitioner's failure to request the Supreme Court of South Carolina to retain jurisdiction over the matter under state procedural law leaves this Court likewise without jurisdiction to review the judgment.

I. PROCEDURAL HISTORY

A.

On March 20, 1987, Demetrius Gathers was convicted in the Court of General Sessions for Charleston County, South Carolina, for murder and criminal sexual conduct in the first degree. On March 21, 1987, a jury rendered a sentencing verdict of death by electrocution. On June 6, 1988, the Supreme Court of South Carolina affirmed Gathers' convictions but reversed his sentence of death and remanded the case to the Court of General Sessions for Charleston County for a new sentencing proceeding.

B.

Petitioner, State of South Carolina, took no action following the Court's reversal of Gathers' death sentence. No Petition for Rehearing was filed and no request to Stay the Remittitur in the case was made. Consequently, and in accordance with South Carolina Supreme Court Rule 17 § 1, and S.C. Code Ann. § 18-9-270, 1976, as amended, on June 17, 1988, the Supreme Court of South Carolina remanded the Remittitur in this case to the Court of General Sessions for Charleston County. (See Exhibit A). On October 27, 1988, Demetrius Gathers filed a Motion for a Speedy Trial with the Clerk of Court of General Sessions for Charleston County, service of which was

acknowledged by the solicitor of the Ninth Judicial Circuit for the State of South Carolina. (See Exhibit B).

II. SOUTH CAROLINA'S PROCEDURAL DEFAULT

A.

By failing to request of the Supreme Court of South Carolina a Stay of the Remittitur in this case, Petitioner, State of South Carolina, has committed a procedural default which bars review of this case by this Court. This is so because under long established South Carolina procedural law, the state Supreme Court lost jurisdiction of the matter at the time of the remanding of the Remittitur. *Ex parte Dunovant*, 16 S.C. 299 (1881); *Brooks* v. *Brooks*, 16 S.C. 621 (1882). Moreover, after a Remittitur has been sent down the Supreme Court of South Carolina no longer has the power to order it returned so as to correct errors, *Carpenter* v. *Lewis*, 65 S.C. 400, 43 S.E. 881 (1903), because the Supreme Court's control of the judgment ends when the Remittitur has issued. *State* v. *Adams*, 83 S.C. 149, 65 S.E. 220 (1909); *State* v. *Merriman*, 35 S.C. 607, 14 S.E. 394 (1891).

B.

While noting that it is important to distinguish between state substantive grounds and state procedural grounds, in *Henry* v. *Mississippi*, 379 U.S. 443, 85 S.Ct. 564 (1965) this Court held that application of a state procedural rule may bar review by this Court of a state trial proceeding if that procedural rule serves a legitimate state interest. Also see *Wainwright* v. *Sykes*, 433 U.S. 72, 108, 97 S.Ct. 2497 (1977) Brennan, J. dissenting; and *Michigan* v. *Tyler*, 436 U.S. 499, 513, 98 S.Ct. 1942, 1951 (1978). Indeed, in *Henry* v. *Mississippi*, this Court stated that:

> where the state rule is a reasonable one and clearly announced to defendant and counsel, application of the waiver doctrine will yield the same result as that of the adequate non-federal ground doctrine in the vast majority of cases.

379 U.S. at 448, note 3. It is important to note that the legitimate state interest requirement of the application of a state procedural rule was set out in *Henry* in conjunction with the assertion of a constitutionally protected federal right guaranteed to individuals. The State of South Carolina seeks the vindication of no such right. Thus, under *Henry, supra*, the legitimate state interest should necessarily warrant a lesser degree of scrutiny, and the State of South Carolina should be held to a higher standard in its duty to comport its actions with state procedural requirements. Nevertheless, the state Supreme Court's issuance of the remittitur and relinquishment of jurisdiction to the lower court, serves the ultimate interest of appellate review: finality and the orderly administration of the state judiciary itself.

But more importantly, Respondent, Demetrius Gathers himself, has relied on application of the state procedural rule. This can be demonstrated by the fact that there were issues raised in the direct appeal to the Supreme Court of South Carolina which were not addressed by that Court. We would direct the Court's attention to the Petition for Writ of Certiorari at page 47 where Petitioner, State of South Carolina, quotes from the State Court opinion. The opinion states:

> We need not address Appellant's remaining exceptions. Appellant's convictions are affirmed, the death sentence reversed, and the case is remanded for a new sentencing proceeding.

Under South Carolina law, a sentence of death cannot be affirmed by the state Supreme Court absent a ruling on

all legal errors in the case. *S.C. Code Ann.* § 16-3-25 (F), 1976, as amended, states

> the sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. *The Court shall render its decision on all legal errors*, the factual substantiation of the verdict, and the validity of the sentence.

Emphasis Added. Clearly, had Petitioner, State of South Carolina, stayed the proceeding in this case it would have put Respondent Gathers on notice that the State intended to seek further review of the Eighth Amendment claim in this case. As a result of that notice, Gathers could have petitioned the Supreme Court of South Carolina to either clarify its initial decision, or expand the scope of that decision to include the additional legal errors asserted in the appeal which were not reached by the opinion.[1]

C.

The Supreme Court of South Carolina's Order in this case became final on June 6, 1988, the date of its publica-

[1] Additional errors which arose from the Gathers sentencing proceeding included: (1) a challenge to the adequacy of the lower court's instruction to the jury concerning the finality of the verdict as opposed to being merely an advisory verdict; (2) whether the lower court commited reversible error when it neglected to charge a mitigating circumstance as required by *S.C. Code Ann.* § 16-3-20 (C)(b)(1) to the effect that Gathers was an accomplice in a murder committed by another; and (3) whether the trial court committed reversible error when it instructed the jury that they were not concerned with the issue of guilt or innocence during the sentencing phase of the proceeding and, further, whether the trial judge committed reversible error when it instructed the jury to "weigh" aggravating circumstances against mitigating circumstances in violation of *State* v. *Bellamy*, ___ S.C. ___, 359 S.E.2d 63 (1987).

tion. *Dept. of Banking, State of Nebraska* v. *Pink*, 317 U.S. 264, 267, 63 S.Ct. 233, (1942). *Pink* holds that the time for computing when a petition for certiorari is due runs from the order's date and not from the entering of the judgment on the order in the lower court. Thus, finality as contemplated by 28 U.S.C. 1257(3) is not deferred by the latent power of a state's highest court to reopen the matter and revise its judgment. *Market St. Ry. Co.*, v. *Railroad Commission of the State of California*, 324 U.S. 548, 551, 65 S.Ct. 770. (1945).

III. CERTIORARI JURISDICTION

A.

In the *Market Street* case this Court dismissed the reason why such a latent power in a state Supreme Court to revise its judgment should not be permitted to defeat the notion of finality.

> Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek our review begins to run.

324 U.S. at 551-52. However, the concept of finality is but one of several *conditions precedent* which have been established by federal law and which must be satisfied before the exercise of this Court's jurisdiction over a state court judgment.

Statute 28 U.S.C. § 1257 requires as conditions precedent finality, prior review by the state's highest court, and *inter alia*, the claim of a right that is specially set up under the United States Constitution. Petitioner asserts this Court possesses jurisdiction over the matter under authority of 28 U.S.C. § 1257(3). Of course, as allowed by 28 U.S.C. § 2101(d) this Court has established as an addi-

tional condition precedent to jurisdiction the sixty day filing requirement under Supreme Court Rule 20.1. However, we assert that other conditions precedent exist which must be satisfied before this Court may properly exercise jurisdiction over a state court judgment.

B.

The granting of a Petition for Writ of Certiorari has been held to operate as a stay of lower court proceedings. See *Glick* v. *Ballentine Produce, Inc.*, 397 F.2d 590 (8th Cir. 1968); *United States* v. *Eisner*, 323 F.2d 38 (6th Cir. 1963) construing 28 U.S.C. §2101. However, the mere filing or anticipated action of filing such a Petition does not translate into an automatic stay. *Glick*, *supra*, 397 F.2d at 594. Certainly, therefore, Petitioner can claim no right to expect that state court proceedings should be automatically stayed simply because it intended to file timely under 28 U.S.C. § 1257(3) and Supreme Court Rule 20.1, nor could it assume that nothing of consequence could occur during the interim period between the issuance of the state court order and the granting of the Petition by this Court. Therefore, it is argued that 28 U.S.C. §2101 creates another jurisdictional condition precedent, if absent its application, events could transpire which defeat the practical effects of this Court's exercise of jurisdiction.

As with the definition of "finality" in the *Market Street* example, within Constitutional and statutory parameters this Court controls and defines the nature and scope of jurisdictional conditions precedent which allow for the ultimate exercise of Certiorari jurisdiction. This is necessary to minimize variable and indeterminate factors. *Market Street Ry. Co.*, *supra*. However, as in the case of *Henry* v. *Mississippi*, *supra*, state procedural requirements must be satisfied when failure to do so materially

affects this Court's practical ability to exercise appellate or certiorari jurisdiction. Because Petitioner failed to take proper steps to stay the state court proceedings (including the issuance of the remittitur) the Writ now sought is directed to a state court which lacks subject matter jurisdiction.

No doubt, Petitioner, State of South Carolina, should have requested a Stay of the state court proceedings in this matter before it sought certiorari review in this Court. 28 U.S.C. §2101(f) e.g. *California* v. *Reigler*, 449 U.S. 1319 (1981); *Fare* v. *Michael C.*, 439 U.S. 1310 (1978). However, no such action was taken to preserve any rights possessed by the Petitioner. Consequently, under state law (which has been in effect throughout this century) the Supreme Court of South Carolina lost jurisdiction to act further in this case. This is a fatal default committed by Petitioner and bars the review it seeks in this Court.

Legal orders validly and properly made in obedience to the higher court are not to be set aside by the subsequent granting of a certiorari writ. *Louisville N.A. & C.Ry. Co.* v. *Louisville Trust Co.*, 78 F. 659 (6th Cir. 1897). Consequently, the South Carolina Supreme Court's issuance of the state remittitur to the Court of General Sessions for Charleston County, conferring subject matter jurisdiction over the case on the inferior court, is not defeated by a subsequent granting of the writ by this Court.[2] And this

[2] At this point, if the *Market Street* case needs to be distinguished procedurally, it should be noted that a stay of the administrative order had been sought and obtained in the state court system in that case. 65 S.Ct. at 553. Therefore, unlike Petitioner State of South Carolina, action had been taken in the *Market Street* case to preserve the status quo pending an ultimate resolution of the dispute. Secondly, the Court's opinion in *Market Street* gives no indication that a challenge to this Court's jurisdiction was made on the procedural grounds advanced herein.

Court has held that subsequent proceedings taken in accordance with local rules of procedure can defeat this Court's appellate jurisdiction. *Southern and Northern etc. v. Public Utilities Comm. of Calif.*, 434 U.S. 9, 98 S.Ct. 251 (1977).

This Court has jurisdiction only over the Supreme Court of South Carolina and not the Court of General Sessions for Charleston County, South Carolina. *Beilan v. Board of Public Education of Philadelphia*, 357 U.S. 399 (1958). Because under local law jurisdiction over the case now resides with the inferior court, Petitioner South Carolina must affirmatively show that any writ of certiorari to the inferior court could not have been directed to the Supreme Court. *C.f. Fisher v. Perkins*, 122 U.S. (1887). This Court has held that a writ of error addressed to a state's highest court must be dismissed if that court lacks jurisdiction over the matter. *Randall v. Board of Commissioners*, 261 U.S. 252, 43 S.Ct. 252 (1923). Since as a matter of state law the Supreme Court of South Carolina now lacks jurisdiction over this case, Petitioner's Writ of Certiorari to the Supreme Court of South Carolina must be dismissed.

IV. ADVISORY DETERMINATION

A.

Under 28 U.S.C. § 2106 this Court may take various actions upon orders ". . . of a court lawfully brought before it for review . . ." However, neither 28 U.S.C. § 2106 nor 28 U.S.C. § 1257 empowers this Court to order a state court to exercise subject matter jurisdiction over a cause in contravention of state law, when that jurisdictional power has been lost as a result of a party litigant's

procedural default.[3] To reach a contrary conclusion could require the Supreme Court of South Carolina to act in a manner which is inconsistent with century old precedent and places this Court in the partial position of moving to protect the interests of one party litigant when that party has itself neglected to do so. Application of this procedural rule, therefore, could nowise be construed as constituting merely an attempt to "evade review." See *Konigsberg v. State Bar of Calif.*, 366 U.S. 36, 82 S.Ct. 21 (1961); *Henry v. Mississippi, supra.*

B.

As previously noted Demetrius Gathers has filed a Motion for a Speedy Trial in the court which now has jurisdiction over the matter. Consequently there is no reason why Mr. Gathers cannot be retried at this time and sentenced to life imprisonment. Therefore, any decision rendered by this Court on Petitioner's request for certiorari review would be advisory only on the scope of Eighth Amendment law in that Gathers' death sentence cannot be reinstated absent subject matter jurisdiction in the state Supreme Court. Advisory opinions by this Court are not favored, *North Dakota State Board of Pharmacy v. Snyder's Drugstores, Inc.*, 414 U.S. 156 (1973); *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459 (1945), and can encroach upon the plenary powers reserved by the state Supreme Court. *Johnson v. Radio Station WOW*, 146 Neb.429, 19 N.W.2d 853 (1945). Also see *United States v. Fruehauf*, 365 U.S. 146, 81 S.Ct. 547 (1961) where this Court refused to give an advanced expression

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[3] On this ground cases such as *Aetna Casualty Co. v. Flowers*, 330 U.S. 464, 67 S.Ct. 798 (1947) can be distinguished. Those cases permit a recall of a federal circuit court remand, and thus do not reach matters of state court jurisdiction.

of legal judgment upon issues which remained unfocused. The Eighth Amendment question in the present case is in a similar posture because we do not know at this time the true nature of either the State's theory of the case at resentencing or the evidence to be introduced at that time.

CLARIFICATION OF OPINION

On October 25, 1988, Demetrius Gathers filed a "Motion for Clarification of Opinion" with the Supreme Court of South Carolina. To that motion on November 23, 1988, Petitioner responded that the state Supreme Court lacked jurisdiction to entertain such a request. While this Court may remand a case for clarification of opinion if it cannot readily be discerned whether the opinion rests on application of state law or federal law, *Orr* v. *Orr*, 440 U.S. 268, 277 99 S.Ct. 1102, 1110 (1979), we would submit that such a remand by this Court could only be made if the record shows that certiorari jurisdiction had been established *ab initio*. As of the date of this motion, the Supreme Court of South Carolina has not ruled on the Motion for Clarification.

CONCLUSION

WHEREFORE, Demetrius Gathers would respectfully request of this Court that the Petition for Writ of Certiorari be dismissed as improvidently granted as a result of Petitioner's procedural default; in the alternative and subject to the foregoing prayer, we would request that this Court stay the proceeding in this Court and remand the case for clarification, *Orr* v. *Orr*, *supra*; in the alternative and subject to the foregoing, we would request that the Petition for Writ of Certiorari be dismissed without prejudice pending the outcome of Respondent's Motion for Clarification now pending in the state Supreme Court. *Southern & Northern, etc.*, v. *Public Utilities Comm. of Calif.*, *supra*.

Respectfully submitted,

WILLIAM ISAAC DIGGS
JOSEPH L. SAVITZ, III
S.C. Office of Appellate Defense
1122 Lady Street
Suite 301
Columbia, SC 29201
Telephone: 803-734-1330
Counsel for Respondent

APPENDIX

EXHIBIT A

The Supreme Court of South Carolina

June 17, 1988

The Honorable Howard A. Taylor
Clerk of Court, Charleston County
P.O. Box 293
Charleston, SC 29401

Re: The State v. Demetrius Gathers

Dear Mr. Taylor:

Enclosed is the remittitur in the above case.

By copy of this letter, all counsel of record are advised of the action of the Court.

Sincerely yours,

/s/Clyde N. Davis, Jr.
CLYDE N. DAVIS, JR.
CLERK

CND,JR/csl
Enclosure
cc: Joseph L. Savitz, III, Esquire
Joseph F. Kent, Esquire
The Honorable Donald J. Zelenka

EXHIBIT B

State of South Carolina
County of Charleston.

IN THE COURT OF GENERAL SESSIONS
CASE NO. 87-GS-10-0468

STATE OF SOUTH CAROLINA,

v.

DEMETRIUS GATHERS,

Defendant.

MOTION FOR SPEEDY TRIAL

Comes now, Demetrius Gathers, by his Attorney, J. Wescoat Sandlin, moving that he be granted a speedy trial.

s/J. Wescoat Sandlin
J. WESCOAT SANDLIN
Attorney for Defendant
18 Broad Street, Suite 304
Charleston, S.C. 29401
(803) 723-6559

October 27, 1988

State of South Carolina
County of Charleston.

IN THE COURT OF GENERAL SESSIONS
CASE NO. 87-GS-10-0468

STATE OF SOUTH CAROLINA,

v.

DEMETRIUS GATHERS,

Defendant.

ACKNOLWEDGMENT OF SERVICE

Service of a copy of the Motion For Speedy Trial in the above entitled action hereby acknowledged at Charleston, South Carolina, this 31st day of October, 1988.

/s/Sheila Miterand
SHEILA MITERAND
SOLICITOR, NINTH JUDICIAL CIRCUIT

Supreme Court, U.S.
FILED
DEC 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

versus

DEMETRIUS GATHERS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
SOUTH CAROLINA

RESPONSE TO MOTION TO DISMISS

T. TRAVIS MEDLOCK
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Chief Deputy
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PETITION FOR CERTIORARI FILED AUGUST 5, 1988
CERTIORARI GRANTED OCTOBER 11, 1988

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No. 88-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

versus

DEMETRIUS GATHERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

RESPONSE TO MOTION TO DISMISS

The State of South Carolina, the Petitioner herein, makes a response to the Motion to Dismiss. In its Motion, the Respondent, Demetrius Gathers, contends that this Court is without jurisdiction to review the judgment of the South Carolina Supreme Court. The Petitioner would respectfully present the following:

I. PROCEDURAL HISTORY

On August 5, 1988, the Respondent, State of South Carolina, filed a Petition for Writ of Certiorari to the Supreme Court of South Carolina in the United States Supreme Court pursuant to 28 U.S.C. §1257(3). In the Petition, the Respondent raised the following questions:

I. Does the Eighth Amendment preclude a prosecutor's comments during a capital murder penalty phase on personal characteristics of the victim where the characteristics are based on evidence admitted in the guilt phase to show the circumstances of the crime?

II. Does Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), preclude prosecutorial comment during a penalty phase closing argument on evidence introduced during the guilt phase of the trial that reveals personal characteristics of the victim?

III. Whether this Court's decision in Booth v. Maryland, supra, misconstrued the requirements of the Eighth Amendment and was wrongly decided?

On October 11, 1988, the United States Supreme Court issued its Order granting the Respondent's Petition for Certiorari. State of South Carolina v. Demetrius Gathers, ___ U.S. ___, 109 S.Ct. 218 (1988). Briefing schedule was established and the State of South Carolina's Brief on the Merits was filed on December 9, 1988. The brief on behalf of Mr. Gathers is due thirty (30) days from the filing. As stated in our Petition for Certiorari, the remittitur was sent to the Court of General Sessions on June 17, 1988. (Petition, p. 2). Further, no re-sentencing hearings have been held in the matter. See Section 1-7-330, CODE OF LAWS (1976) (solicitor's authority concerning the preparation of the docket and order in which the cases are called).

The Respondent made an Order of Clarification on October 25, 1988, requesting the Supreme Court of South Carolina to reconsider its prior decision. On December 9, 1988, the Supreme Court issued its Order denying the Motion.

II. ARGUMENT

In its initial argument in the Motion to Dismiss, the Respondent contends that certiorari review should be barred because the remittitur was sent to the lower court in accordance with South Carolina law and procedure. Rule 17, Rule of the Supreme Court of South Carolina. We submit that this Court's precedent does not support the position of the Respondent. Further, the Respondent has misapprehended the authority and jurisdiction of the South Carolina Supreme Court in both precedent and practice.

The United States Supreme Court has consistently stated that the mere fact the remittitur has been sent down does not divest the United States Supreme Court of its jurisdiction in this matter. In Carr v. Zaja, 283 U.S. 52, 53, 51 S.Ct. 360, 75 L.Ed. 836 (1931), Justice Holmes, for the Court, stated on similar facts that:

> It is objected that the mandate of the Circuit Court of Appeals was not stayed, but was issued to the District Court and spread upon its records and that therefore the case is finished. But that does not defeat the jurisdiction of this Court. The Conqueror, 166 U.S. 110, 113, 17 S.Ct. 510, 41 L.Ed. 937 (1897); Louisville and Nashville R. Co. v. Behlmore, 169 U.S. 644, 648, 18 S.Ct. 502, 42 L.Ed. 889 (1898).

In The Conqueror, supra, the Court stated: "The fact that the mandate of the circuit court of appeals to the district court, affirming the decision of that court, had gone down is immaterial ... if a writ of certiorari

can issue at all after a final disposition of the case in that court, it could not be defeated by the issue of a mandate to the court below." 166 U.S. 110, 113-114. In Louisville R. Co., supra, the Court stated:

> When cases are brought here from the circuit court of appeals, we are, of course, called on to review the judgments of those courts, in revision of the judgments of the courts below, but our mandate goes to the court of first instance, and is there carried into effect, though the court of appeals may have sent its own mandate down before the case was brought to this court of appeal, writ of error, or certiorari.

69 U.S. at 648. Similarly, in Aetna Casualty and Surety Company, et al. v. Flowers, 330 U.S. 464, 467 (1947), the Court stated "nor does the fact that the mandate of the Circuit Court of Appeals has issued defeat this Court's jurisdiction," citing Carr v. Zaja, supra. More recently, Justice Rehnquist

for the Court has cited this same fundamental rule of law with approval. U.S. v. Villamonte-Marquez, 462 U.S. 579, 581 n.2 (1983). [The fact that the government did not obtain a stay, thus permitting the issuance of the mandate of the Court of Appeals, would not change the effect of our reversal (to reinstate the conviction and sentence)]. Clearly then, we submit that certiorari jurisdiction in the United States Supreme Court is not affected or defeated by the fact that the remittitur was sent to the Circuit Court on June 16, 1988. Petitioner further submits that the Supreme Court was made aware of this fact of the remittitur being sent down in our Certiorari Petition on page two.

The Petitioner further submits that while the Respondent has generally stated the law of remittitur accurately,

it failed to bring to the Court's attention certain obvious exceptions that have arisen in South Carolina practice. The power of the South Carolina Supreme Court to recall the remittitur under appropriate circumstances is well established. In State v. Merriman, 34 S.C. 576, 578, 13 S.E. 898 (1890), Justice McIver stated in general terms that such motion can be made in the South Carolina Supreme Court to recall the remittitur if it has not been acted upon by the lower court. In a subsequent decision, State v. Merriman, 35 S.C. 607, 14 S.E. 394 (1892), that where the Circuit Court had already acted in fully carrying out the mandate, thereby assigning a day for the execution of a sentence, it was too late to make the motion. Similarly, in State v. Keels, 39 S.C. 553, 554, 17 S.E. 724 (1893), in a per curiam decision, the

Court stated in denying a motion to recall the remittitur:

> [I]t is more than questionable whether this Court has the power to recall the remittitur after it has been sent down to the Circuit Court, and acted upon by that Court, which as we are informed on the argument here, was the fact in this case ....

(Emphasis in original). Accord McKenzie v. Sifford, 52 S.C. 394, 26 S.E. 706 (1898). (Court will not recall a remittitur granting a new trial after the new trial had been held).

More recently, this Court has been involved in three (3) matters in which the Court granted certiorari, vacated the judgment of the South Carolina Supreme Court and remanded the matter for further consideration. Edward Lee Elmore v. South Carolina, 476 U.S. 1102 (May 5, 1986); Donald Allen Jones v. South Carolina, 476 U.S. 1102 (May 5, 1986); Jerry W. Plemmons v. South

Carolina, 476 U.S. 1103 (May 5, 1986). The remittitur from each of these matters had previously been sent to the lower court by the South Carolina Supreme Court on March 5, 1986, March 5, 1986, and July 16, 1985, respectively. Upon receipt of the mandate from the United States Supreme Court, the Supreme Court of South Carolina remanded each of the matters to the trial court for a new sentencing proceeding on June 6, 1986. The Petitioner, under separate cover, is providing copies of these matters to the Clerk of this Court and counsel.

Clearly, the timely filing of the Petition for Certiorari from the judgment of the South Carolina Supreme Court rendered appropriate jurisdiction in this Court, pursuant to Rule 20 of the Rules of the United States Supreme Court and 28 U.S.C. § 1257(3) and 28 U.S.C. § 1201. Further, there has been

of mootness in the matter since the resentencing proceedings have not occurred. See North Carolina v. Rice, 404 U.S. 244 (1971); United States v. Sharpe, 470 U.S. 675 (1985); Garrison v. Hudson, 468 U.S. 1301 (1984). His assertions to the contrary are simply not supported by this Court's clear and unequivocal precedent. Carr v. Zaja, supra.

The Respondent has further misapprehended this Court's decision in Henry v. Mississippi, 379 U.S. 443 (1965), which is both factually and legally distinguishable from the present situation. In Henry, supra, this Court held that the Court will decline to review state court judgments that rest upon independent and adequate state grounds, such as the procedural default of failing to object to the federal ground that served a legitimate state

interest. Similarly, in Wainwright v. Sykes, 433 U.S. 72 (1977), this Court held generally that federal habeas corpus review may be similarly barred where the contemporaneous objection to the admission of a confession was not made as required by state law to preserve the issue for appeal unless cause and prejudice for such default is shown. Since the South Carolina practice has been to routinely send the remittitur to the lower court in every case, to accept the Respondent's logic would be to bar federal review of every conviction or appeal from South Carolina in certiorari or habeas corpus review, even though the jurisdictional requirements for review have been met. The prior decisions of this Court do not support such a view and the prior practice of the South Carolina courts does not require such a result.

The Respondent further contends that the mere filing of a motion for a speedy trial defeats the jurisdiction of this Court in the matter. As of the filing of this response, no time certain for any resentencing proceeding has been set. See Section 1-7-330, CODE OF LAWS (1976) (solicitor's authority to establish the docket and order of cases to be called). This Court has previously issued a stay of state court proceedings pursuant to an Order of the Federal District Court where "the normal course of appellate review might otherwise cause the case to become moot." Garrison v. Hudson, 468 U.S. 1301 (1984). Therein, Justice Burger held that "foreclosure of certiorari review by this Court would impose irreparable harm upon applicants." Here, where counsel had control of the docket and no day certain for the

resentencing has been set, his present speculation that the Court will be faced with a situation of "mootness" and an advisory situation is simply not supported by the status of the present proceedings in South Carolina. Simply put, the jurisdictional power of this Court has not been lost. This is especially true where the Respondent conceded in his motion before this Court that "the granting of a Petition for Certiorari has been held to operate as a stay of lower court proceedings." (Motion to Dismiss, p. 8).

Finally, in his Motion to Dismiss, he contends that he moved before the South Carolina Supreme Court for clarification of its opinion requesting the state court to rule that it granted the relief on the basis of a state ground rather than the clear and unambiguous statement of the state court

that they found a violation of the Eighth Amendment. The State of South Carolina responded that the court lacked jurisdiction over the matter because it was an untimely petition for rehearing and that the court was clear in its holding. We specifically stated in our response that this Court had jurisdiction to require the state court to act in accordance with the mandate of this Court on remand and the state court had authority to recall the remittitur when appropriate. On December 9, 1988, the state court denied the belated motion for clarification.

In his conclusion, the Respondent seeks to have the certiorari matter dismissed as being improvidently granted. For the reasons stated herein, the Petitioner respectfully submits that the Motion is ill-founded and must be dismissed. Alternatively, he seeks a remand for a clarification of the

opinion of the South Carolina Supreme Court. This issue was raised in the Brief in Opposition of the Respondent. Here, there was no ambiguity in the lower court's decision that it rested solely upon its interpretation of the Eighth Amendment. As this Court has stated:

> When, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Michigan v. Long, 463 U.S. 1032, 1040-1041 (1983). Here, the state court clearly stated "because the solicitor's remarks violated the eighth amendment rights, we reverse the death sentence." (J.A. p. 66). Further clarification is not necessary. His motion should be denied and dismissed.

CONCLUSION

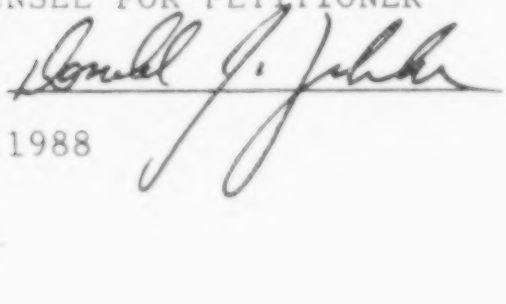
For all the foregoing reasons, the Motion to Dismiss of the Respondent should be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

COUNSEL FOR PETITIONER

By: 

December 19, 1988

No. 88-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

versus

DEMETRIUS GATHERS,

Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Petitioner's Response to Motion to Dismiss on the Respondent by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to William Isaac Diggs, Esquire, 1122 Lady Street, Suite 301, Columbia, South Carolina 29201. He further certifies that all parties required to be served have been served.

This 19th day of December, 1988.

Donald J. Zelenka

SWORN to before me this
19th day of December, 1988.

(LS)
Notary Public for South Carolina
My Commission Expires: 4-14-97.

No. 88-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

versus

DEMETRIUS GATHERS,

Respondent.

AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and forty copies of Petitioner's Response to Motion to Dismiss in the above captioned case by depositing same in the U. S. Mail, first-class postage prepaid, and properly addressed to the Clerk of this Court.

This 19th day of December, 1988.

Donald J. Zelenka

SWORN to before me this
19th day of December, 1988.

Notary Public for South Carolina
My Commission Expires: 4.1.97.

Supreme Court, U.S.
FILED
JAN 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SOUTH CAROLINA,

Petitioner,

v.

DEMETRIUS GATHERS,

Respondent.

REPRINTED COPY

On Writ Of Certiorari To The Supreme Court Of South Carolina

REPLY TO RESPONSE TO MOTION TO DISMISS

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Respondent, Demetrius Gathers, makes the following points in reply to the Petitioner's Response to the Motion to Dismiss:

I. INAPPLICABILITY OF *CARR* v. *ZAJA*

At pages five through seven of Petitioner's response, heavy reliance is placed upon *Carr* v. *Zaja*, 283 U.S. 52, 51 S.Ct. 360 (1931) and cases collected and cited therein. At page twelve of the Motion to Dismiss at Footnote three (3) this point is addressed and argues that precedant such as the *Carr* case refers to a mandate which has been sent down by the United States Court of Appeals to a Federal District Court. We believe this is an important distinction from the instant case. This case involves a Remittitur which has been sent down by a State's highest court thereby ending jurisdiction of that court to act in the matter. *Carr* v. *Zaja*, *supra*, and *Aetna Casualty and Surety Company* v. *Flowers*, 330 U.S. 464, (1947) do not stand for the proposition that this Court may order a state Supreme Court to assume jurisdiction over a case when jurisdiction has been lost as a matter of state procedural law as a result of a party litigant's procedural default.

II. STATE PROCEDURE: PAST AND PRESENT

A.

Petitioner has acknowledged that we have "generally stated the law of Remittitur accurately" in the State of South Carolina, (Response to Motion to Dismiss at page 7), but alleges that we have failed to bring to this Court's attention "certain obvious exceptions" that exist under South Carolina practice. *Id.*, page 8.

Respondent submits there are no "obvious exceptions" to the law as asserted in the Motion to Dismiss. Petitioner has relied upon *State* v. *Merriman*, 34 S.C. 576, 13 S.E. 898 (1890); *State* v. *Merriman*, 35 S.C. 607, 14 S.E. 394

(1892); *State* v. *Keels*, 39 S.C. 553, 17 S.E. 724 (1893) and *McKenzie* v. *Sifford*, 52 S.C. 394, 26 S.E. 706 (1898) to demonstrate the existence of those "obvious exceptions" that have arisen under South Carolina practice. But not one of the foregoing cases held that a Remittitur can be recalled by the state Supreme Court and the judgment previously entered by that Court reversed as a result thereof. Accordingly, those cases do not establish obvious exceptions to the law as set out in the Motion to Dismiss.

B.

Furthermore, when taking the argument of the Petitioner in a light most favorable to the State of South Carolina, at best it could be said that there was some ambiguity in this area of the law in the latter part of the Nineteenth Century. However, in 1892 the State rule regarding the procedure for staying the Remittitur in the state Supreme Court was amended. See S.C. Sup.Ct.R.XX (1902) at p. 276. Supreme Court Rule XX was codified in the first codification of the South Carolina General Statutes in 1902. See *Code of Laws of S.C., 1902.*, In *Carpenter* v. *Lewis*, 65 S.C. 400, 43 S.E. 881 (1903) any ambiguity in this area was certainly laid to rest. In *Carpenter* v. *Lewis*, *supra* the Court dealt with a motion to recall the Remittitur. In refusing to do so the Court reviewed the foregoing rule and then explained why state procedural law required the Supreme Court to retain jurisdiction over the case for a specified period of time. The court stated

> [t]he object of this is to reserve jurisdiction over the case, so that, should either of the parties desire to make any motion in reference thereto, they might have the opportunity to do so, and the court the power to hear it. After the Remittitur, however, is sent down, the case passes beyond the reach of the

> court, and its jurisdiction is lost, and no motion can be heard by this court on the matter thereafter.

43 S.E. at 882. *Compare Mickle* v. *Blackmon*, 255 S.C. 136, 177 S.E.2d 548 (1970). Consequently, whatever dicta Petitioner may rely upon from the earlier cases dealing with the possibility of recalling a Remittitur so as to make substantive changes in the verdict, would have certainly been overruled by subsequent case law, *Carpenter* v. *Lewis*, *supra;* statutory law, *S.C. Code Ann.* § 18-9-270, 1976, as amended; and Court Rule, S.C. Supp. Ct.R. 17 (1976).

III. ELMORE, JONES AND PLEMMONS

A.

Lastly, Petitioner has submitted certain paperwork from the cases of *Edward Lee Elmore* v. *South Carolina*, *Donald Allen Jones* v. *South Carolina*, and *Jerry W. Plemmons* v. *South Carolina*. In each of those cases the Supreme Court of South Carolina ordered a new capital sentencing hearing after being told to do so by this Court and after their respective Remittiturs had been remanded. See *Skipper* v. *South Carolina*, 476 U.S. 1, 106 S.Ct. 1669 (1986). However, simply because Petitioner, State of South Carolina, chose not to assert any challenge to the state Supreme Court's jurisdiction to order resentencing hearings in those cases should neither alter the status of the law in South Carolina nor bind forevermore future party litigants in future litigation. Consequently, simply because the Petitioner may have waived any rights to challenge the lower court's jurisdiction in the aforementioned cases should in no way be binding upon the Respondent in the instant case.

Additionally, it needs to be noted that South Carolina law treats an affirmance of a death sentence differently

from the way it treats a reversal of a death sentence. As we pointed out in the Motion to Dismiss, *S.C. Code Ann.* § 16-3-25(F), 1976, as amended, prohibits the affirmance of a death sentence absent a ruling on all legal errors presented in the case. It reasonably follows that the Court need *not* address all legal errors when it reverses a death sentence. This is exactly the course of action the Court followed in the instant case. Moreover, *S.C. Code Ann.* § 17-25-370 requires that a death order be issued by the state Supreme Court upon the remanding of the Remittitur upon the affirmance of a death sentence. Documents show that the state Supreme Court issued a stay of execution in the *Elmore* case on June 6, 1985, in the *Plemmons* case on September 26, 1985, and in the *Jones* case on July 15, 1985. (See Attachments). Thus, due to its noncompliance with *S.C. Code Ann.* § 17-25-370 the state Supreme Court implicitly acknowledged that it would not permit a state procedural rule to bar retrial of those three individuals.

B.

All of the capital cases relied upon by the Petitioner which supposedly represent the current practice in the State of South Carolina, were cases which were affirmed by the state Supreme Court and which were reversed by this Court with orders, in effect, requiring new sentencing proceedings. As we noted in our Motion to Dismiss, *Henry* v. *Mississippi*, 379 U.S. 443, 85 S.Ct. 564 (1965) states that the application of the state procedural rule must necessarily be balanced against the legitimacy of the state interest involved in following it. It may be that Mssrs. *Elmore*, *Jones*, and *Plemmons* could all overcome application of the procedural rule simply because to bar an unconstitutional execution of each of them could outweigh any legitimate state interest in application of the procedural rule at issue. Nevertheless, at this juncture South Carolina's failure to seek application of the procedural rule in those cases should act as a concession that such was the case. This certainly should not translate, however, into an assumption that the standard practice in South Carolina regarding the issuance of the Remittitur has been changed because of that concession.

CONCLUSION

WHEREFORE Respondent would request that the Motion to Dismiss and this Reply be treated as part of its Brief in Opposition and we would request that the Petition for Writ of Certiorari be dismissed as have been improvidently granted.

Respectfully submitted,

/s/William Isaac Diggs
WILLIAM ISAAC DIGGS
Chief Attorney

/s/Joseph L. Savitz, III
JOSEPH L. SAVITZ, III
Assistant Appellate Defender
Attorneys for Respondent

APPENDIX

APPENDIX

The Supreme Court of South Carolina

THE STATE,

Respondent,

v.

EDWARD LEE ELMORE,

Appellant.

ORDER

Petition for Stay of Execution filed in the above matter is granted for a period of sixty (60) days from the date of this Order pending filing of Petition for Writ of Certiorari in the United States Supreme Court.

IT IS SO ORDERED.

/s/_____C.J.
FOR THE COURT

Columbia, South Carolina
June 6, 1985

APPENDIX

The Supreme Court of South Carolina

THE STATE,

Respondent,

v.

DONALD ALLEN JONES,

Appellant.

ORDER

Petition for Stay of Execution filed in the above matter is granted for a period of sixty (60) days from the date of this Order pending filing of Petition for Writ of Certiorari in the United States Supreme Court.

IT IS SO ORDERED.

/s/_____

FOR THE COURT
David W. Harwell, A.J.,
not participating

Columbia, South Carolina
July 15, 1985

APPENDIX

The Supreme Court of South Carolina

THE STATE,

Respondent,

v.

JERRY W. PLEMMONS,

Appellant.

ORDER

Petition for Stay of Execution is granted until such time as the United States Supreme Court has ruled on Petition for a Writ of Certiorari in the above entitled matter.

/s/_____C.J.

Columbia, South Carolina
September 26, 1985

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether the Eighth Amendment's prohibition against cruel and unusual punishment precludes a sentence of death imposed as the result of the personal characteristics of the victim when those traits have not been established, in any substantial and meaningful way, as an impetus for the murder?

II. Whether the South Carolina Supreme Court correctly interpreted and applied this Court's Eighth Amendment jurisprudence in *State* v. *Gathers?*

III. Whether, assuming a victim's personal characteristics are found to be a legitimate sentencing consideration, Gathers' inability under South Carolina law to rebut the prosecution's claims of good character nevertheless prohibited the solicitor's argument?

IV. Whether the solicitor's misrepresentation of the evidence relating to the victim's personal characteristics amounted to a denial of due process?

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STATEMENT OF THE CASE

A. Introduction

This case involves the solicitor's closing argument in the sentencing phase of Gathers' trial. Because of that argument, the South Carolina Supreme Court vacated the death sentence imposed by the jury:

> Appellant contends the solicitor's closing argument at the sentencing phase of trial violated *Booth* v. *Maryland*, 482 U.S. [496], 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), by focusing extensively on the personal characteristics of the victim. We agree.

State v. *Gathers*, 295 S.C. 476, 369 S.E.2d 140, 143 (1988). The Court explained the basis for its decision:

> The solicitor's extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime. *Cf. State* v. *Bell*, 293 S.C. 391, 360 S.E.2d 706 (1987). These remarks conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter. Because the solicitor's remarks violated appellant's eighth amendment rights, we reverse the death sentence. *Accord State* v. *Gaskins*, [284 S.C. 105, 326 S.E.2d 132 (1985)] (evidence of victim's bad character not admissible as mitigating evidence in sentencing phase).

Id., 369 S.E.2d at 144. In light of this holding, the Court concluded, "We need not address [his] remaining exceptions." *Id.*

B. Summary of Evidence

The victim was Richard Haynes, a black male 31 years of age at the time of his death, who, although without formal religious training, referred to himself as the "Reverend Minister" Haynes. [J.A. 6, 10]. His mother, Doro-

thy Haynes, spoke of her son during the guilt phase of the trial. "He got saved about three years ago . . . . He carry his religious item, his Bible; and he talks to people all the time about the Lord." [J.A. 5]. Apparently, though, his conversion had a darker aspect. Approximately one year later, he began to have "some mental problems" and had been "in and out of our mental hospital" on three occasions. [J.A. 4]. He was unmarried and did not have regular employment, although he did work some "odd jobs" during the month of his death, September of 1986. [J.A. 4-6].

According to Mrs. Haynes, "[H]e liked to wander around and come back. That is what he usually does." [J.A. 7]. During these wanderings, in addition to his two Bibles, he carried with him two bags containing various artifacts of personal religious significance. [J.A. 9, 10, 35]. His mother identified the Bibles (State's Exhibits 7 and 10) and two of the items, "olive oil, what he used to annoint people and pray for them" (State's Exhibit 8) and a sheet (State's Exhibit 9), and they were admitted into evidence. [J.A. 8-10; R. 9].

Haynes arrived at his mother's house on Saturday, September 13, 1986, at 8:40 p.m. [J.A. 6]. He left at 10:15 p.m. [J.A. 7]. The bicycle pathway where he died was approximately 500 yards from his mother's house. [J.A. 6].

Haynes' body was discovered at 1:00 a.m. on September 14th by 13-year-old Vitreni Brown. [R. 714, 718]. Brown also observed what "[l]ook[ed] like clothes and then papers of a Bible." [R. 718]. He went home and told his mother; she called the police. [R. 719].

Officers arrived on the scene shortly after receiving the call. [R. 768]. There they found, in addition to the Bibles, olive oil and sheet previously introduced into evidence, several other articles: rosary beads (State's Exhibit 12), a

silver razor (State's Exhibit 13), "a brown wallet containing miscellaneous paper, Social Security cards and other papers" (State's Exhibit 14), loose "religious cards," including "The Game Guy's Prayer" (State's Exhibit 15), a "wine cooler" carton (State's Exhibit 16), two small white angel replicas (State's Exhibit 17), loose "personal papers" including Haynes' voter registration card (State's Exhibit 19), and a check made out to a local grocery store (State's Exhibit 20). [R. 9, 768-788]. These items were admitted into evidence during the testimony of crime scene technician Anthony Hazel. [*Id.*].

The prosecution's key witness was Esdavan Duval "Steven" Hardrick. He testified that he, Gathers, Dyonzoria Brown and Zandell Hayes, all black youths, spent the evening hours of September 13th wandering about an area which included the bicycle pathway. [J.A. 11-15]. Hardrick and his friends often "hung out" at a particular bench on the pathway drinking beer and smoking marijuana. [J.A. 11, 31].

Later that night, "about 8:00 or 9:00," the four bought a 12-pack of beer and made their way to the bench, drinking as they walked. [J.A. 15-16]. There is no indication that they were out seeking someone to harm, or that they anticipated or desired the tragic escalation of events shortly to follow.

As the youths approached, they observed a man they did not know (Haynes) standing by the bench. [J.A. 16-17; R. 867, 891-893]. The area was not lighted, but it looked to Hardrick "like he was pulling up his pants." [J.A. 17]. Haynes sat down on the bench with his Bible and "some paper." [J.A. 17, 26]. He was drinking a wine cooler and another was sitting on the bench. [R. 607].

> When we came up to him, all of us told him hi, hello. Then we sat down next to him. And we started drink-

ing our beer. We had the radio on at the time. And then Demetrius was talking to the guy, and he [Haynes] said he didn't want to talk to him at the time. . . . I saw him hit the man with his fist. . . . [H]e fell back. When he fell back, he fell more or less into Zandell Hayes. And at that time he [Haynes] went wild. . . . After that, Zandell Hayes had hit the man. . . . Then he [Haynes] kind of like moved up the bike path, and him and Demetrius was fighting. . . . [T]hey were fighting, and Mr. Haynes was backing up, and then they kind of like hooked up together, and they were like rolling on the ground. . . . After he had pinned the guy, Mr. Haynes, on the ground, that is when Dyonzoria went over there. And I believe he hit the guy. He hit the guy a couple of times. . . . He hit him with his foot and with his fist. . . . [T]hen after that Dyonzoria had got a bottle, and he struck the guy in the head with the bottle, twice. . . . Then Demetrius had picked up a bottle, and he hit the guy with the bottle until it finally broke, which was about three times. . . . I believe he [Haynes] was saying, "Oh, Lord." . . . I believe he was unconscious down there because he wasn't moving, and that is when I went over to him and kind of like nudged him with my foot to see if he was all right.

[J.A. 18-22].

Hardrick looked through the contents of one of Haynes' bags, but found nothing he wanted. [J.A. 34-35]. Next, Gathers went through his things: "[W]hen he went through his belongings he started throwing things about, just throwing them everywhere, looking through things." [J.A. 27]. After about a minute of this, Gathers took Dyonzoria's umbrella and began hitting Haynes "about in his back and his head." [J.A. 24, 28].

> At this time me and Mr. Hayes told them let's go. So we walked back into the middle of the path going to Starcastle Apartments, and that is when Dyonzoria had joined up with us. As we were walking through there we could look back and see the bike path and see that Demetrius and the guy—well Demetrius was still hitting the guy—. . . [T]he guy's pants was like not all the way up. It was like, you know, about to his thighs. And then that is when he got the umbrella and stuck that up the man's behind. . . . [He] [u]sed the top end of the umbrella. . . . I believe he [Haynes] was groaning at the time. . . . After that, you know, we called him and tell him let's go. Then we were walking to the Starcastle Apartments, and after we had got out the path that is when he ran and rejoined up with us.

[J.A. 22-26].

At the apartment complex, they met up with four friends, James Carter, Jerome Heyward, Rosemary Campbell and her brother, Hodges Campbell. [R. 667-701]. Carter described their behavior: "[Dyonzoria] Brown was talking about he was strictly business, he wasn't taking no more mess from anybody. And so, you know, they started telling us about they messing up someone on the track, the bike path which we call the track. And they started telling us, they said something about they was beating him up or something." [R. 670]. Zandell said, "Come on, MiMi [Gathers], let's go kill him." [*Id.*].

According to Hardrick, the four youths headed back out to the pathway. [J.A. 28]. Zandell went first. [J.A. 29]. Gathers followed approximately one minute later. [J.A. 30]. On the way, Hardrick and Dyonzoria decided instead to go to Rosemary Campbell's house. [J.A. 28]. Zandell rejoined them approximately two minutes later. [J.A. 30]. Three to five minutes later, Gathers reappeared. [*Id.*]. "[W]hen Demetrius came back, he had the knife; and he told us that he had stabbed the man. He showed the knife to us." [J.A. 36].

Gathers gave two statements to the police. In the first, he asserted an alibi. [R. 865-867]. In the second, he claimed he had hit Haynes "two times in the chest" and had poured beer in his face "to try and wake him up," but he denied inflicting further injuries with fist, knife or umbrella. [R. 889-893].

The jury found Gathers guilty of murder and criminal sexual conduct in the first degree in the first phase of the trial. [J.A. 1; R. 1135].

On motion of the solicitor, "all the testimony and exhibits adduced and produced at [the] guilt phase" were admitted into evidence in the sentencing phase. [R. 1167]. That accomplished, the prosecution rested its case. [R. 1168].

In his sentencing phase summation, the solicitor argued, in relevant part:

> This defendant, Demetrius Gathers—and if you were to decide this case based on sympathy—and, of course, that is not the way to do it—but looking at Revered Minister Haynes and his family and his situation, you would sentence this defendant to death in a minute. But you don't do it that way. You look at the mitigating and aggravating circumstances. You look at the individual characteristics of this defendant and the crime. Let's look at that.
>
> * * *
>
> And you will have the exhibits to think about what happened out there. You will have some exhibits in there that will tell you, tell you what your decision must be in this case, although it's not pleasant. We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there. This defendant strewn them across the bike path, thinking nothing of that. Among the many cards that Reverend Haynes had among his belong-

> ings was this card. It's in evidence. Think about it when you go back there. He had his religious items, his beads. He had a plastic angel. Of course, he is with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person. But look at Reverend Minister Haynes' prayer. It's called The Game Guy's Prayer. "Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask for the stuff to give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, Oh God, help me to always play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who were out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf and sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life." Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune. And he took things as they came along.

He was prepared to deal with the tragedies that he came across in his life.

* * *

You will find some other exhibits in this case that tell you more about a just verdict. Again this is not easy. No one takes any pleasure from it, but the proof cries out from the grave in this case. Among the personal effects that this defendant could care little about when he went through it is something that we all treasure. It speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card. Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers. Weigh the aggravating circumstances in this case. Look at it very carefully. Calmly, rationally. Reverend Haynes believed that he could come onto our public parks and sit and be protected, that the law protected him. That Demetrius Gathers would not reign supreme on that public bench.

[J.A. 39–44].

Next, defense counsel argued, in relevant part:

> I wish there was some way that Ricky Haynes could speak to us, but that is not possible. Ricky Haynes is a victim, and a victim I don't want you to forget when you go into that jury room to make the determination of sentence. Ricky Haynes has been constantly characterized as Reverend Minister Haynes. The clear implication is that he was a Christian. I ask you to think about what the implications of that Christian faith were and are and will be in the future. . . . All of us are searching for the truth, all of us are looking for justice. Part of the search for justice requires compassion and mercy. . . . The real question, ladies and gentlemen, is where will the pain end? The pain for society, the pain for the victim's family, and the pain for the family of the defendant? . . . You are answerable only to God, the God of us all. Blessed are the merciful.

[J.A. 45-46].

After the trial judge's final instructions, the jury recommended that Gathers be sentenced to death by electrocution, having found that the murder was committed while in the commission of criminal sexual conduct in the first degree. *See* Section 16-3-20 of the *South Carolina Code of Laws* (1976, as amended). [R. 1246]. The judge sentenced him to death for the murder and a consecutive term of imprisonment for thirty years for criminal sexual conduct. [R. 1260].

SUMMARY OF ARGUMENT

At the broadest level, the resolution of this case depends upon whether the Eighth Amendment's prohibition against cruel and unusual punishment tolerates a sentence of death imposed as the result of the personal characteristics of the victim (for example, his psychological makeup, his moral orientation, his economic status, or a combination of such factors) when those traits have not been established, in any substantial and meaningful way, as an impetus for the murder. Technically speaking, the question at this level is whether these characteristics are, in and of themselves, a "circumstance of the crime."

An affirmative answer would effect a revolutionary and fundamental reworking of the basic concerns and focus of this Court's Eighth Amendment jurisprudence since *Furman* v. *Georgia*, 408 U.S. 238 (1972). During this period, the Court has heretofore limited a capital defendant's "criminal culpability" to factors bearing upon his "personal responsibility and moral guilt." *Enmund* v. *Flor-*

ida, 458 U.S. 782, 801 (1982). "[R]ace, religion, or political affiliation" have been held to be "constitutionally impermissible [and] totally irrelevant" to the sentencing process. *Zant* v. *Stephens*, 462 U.S. 862, 885 (1983).

Allowing the sentencing decision to depend upon the victim's personal characteristics, when there exists no apparent nexus between those traits and the defendant's decision to kill, cannot be reconciled with these salutary principles. The decision to impose a death sentence would become instead a function of such arbitrary and irrelevant factors as the race, wealth, celebrity or beliefs of the victim.

In *Gathers*, the South Carolina Supreme Court unambitiously read *Booth* as an equally unambitious application of settled Eighth Amendment law. The Court vacated Gathers' death sentence because the solicitor told the jury that death was warranted for no other reason than simply because "the victim was a religious man and a registered voter." *Gathers*, 369 S.E.2d at 144. The prosecution did not establish or claim a nexus between Haynes' personal characteristics and Gathers' decision to kill.

At a more immediate level, this Court's disposition of the case must also be informed by two additional factors. The first involves a rule of law apparently peculiar to South Carolina. The second involves the solicitor's deviation from the evidence and its reasonable inferences in his closing argument.

In South Carolina, the defense may not attack the worth of a victim in the penalty phase of a capital trial, whether through the introduction of negative evidence or by argument. *State* v. *Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985). Since the defense was unable to respond to the solicitor's closing argument in kind, the sentence of death

ran afoul of "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain'." *Skipper* v. *South Carolina*, 476 U.S. 1, 5 n. 1 (1986), quoting *Gardner* v. *Florida*, 430 U.S. 349, 362 (1977). It also violated the Eighth Amendment's prohibition against precluding a defendant from offering relevant evidence or argument in mitigation. *Skipper; Eddings* v. *Oklahoma*, 455 U.S. 104 (1985).

Finally, the inability of the defense to challenge the victim's character under state law in no small measure aided the solicitor in consistently and dramatically misrepresenting the evidence of the victim's personal characteristics and beliefs. This "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 643 (1974).

ARGUMENT

A. The Eighth Amendment's Prohibition Against Cruel And Unusual Punishment Precludes A Sentence Of Death Imposed As The Result Of The Personal Characteristics Of The Victim When Those Traits Have Not Been Established, In Any Substantial And Meaningful Way, As An Impetus For The Murder. In *State* v. *Gathers*, The South Carolina Supreme Court Merely Read *Booth* v. *Maryland* As Authority For This Principle. [Questions Presented I and II].

In *Booth* v. *Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 2533, 96 L.Ed.2d 440 (1987), this Court wrote that the "Victim Impact Statement" (VIS) in the case "provided the jury with two types of information." In fact, the VIS revealed three separate and distinct types of information. First, the VIS "described the personal characteristics of the victims." *Id.* Second, it described "the emotional

impact of the crimes on the family." *Id.* Third, it set forth "the family members' opinions and characterizations of the crimes and the defendant." *Id.* The emphasis of the VIS was, however, on the first two categories, "the emotional trauma suffered by the family and the personal characteristics of the victims." *Id.*

The sentencing authority in a capital trial should not be permitted to rely upon the victim's personal characteristics or the impact of the killing upon the survivors, the majority reasoned, because "[t]hese factors may be wholly unrelated to the blameworthiness of a particular defendant." *Id.*, 107 S.Ct. at 2534.

> As our cases have shown, the defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family. Moreover, defendants rarely select their victims based on whether the murder will have an effect on anyone other than the person murdered. Allowing the jury to rely on a VIS therefore could result in imposing the death sentence because of factors about which the defendant was unaware, and that were irrelevant to the decision to kill. . . . Nor is there any justification for permitting such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character.

Id. (footnotes omitted).

The majority did allow that "[s]imilar types of information may well be admissible because they relate directly to the circumstances of the crime." *Id.*, 107 S.Ct. at 2535 n. 10.

The dissenters in *Booth* were of the view that the circumstances of a crime necessarily encompassed the loss suffered by the victim's family and his community. "The affront to humanity of a brutal murder such as petitioner

committed is not limited to its impact on the victim or victims; a victim's community is also injured, and in particular the victim's family suffers shock and grief of a kind difficult even to imagine for those who have not shared a similar loss." *Id.*, 107 S.Ct. at 2539 (White, J., dissenting). "To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to prescribe a debate on the appropriateness of the capital penalty with one side muted." *Id.*, 107 S.Ct. at 2542 (Scalia, J., dissenting). *See*, also, *Mills* v. *Maryland*, 486 U.S. ___, 108 S.Ct. 1860, 1876, 100 L.Ed.2d 384 (1988) (Rehnquist, C.J., dissenting) ("Virtually no limits are placed on the mitigating evidence a capital defendant may introduce concerning his own history and circumstances, yet the state is precluded from demonstrating the loss to the victim's family, and to society as a whole, through the defendant's homicide. If a jury is to assess meaningfully the defendant's moral culpability and blameworthiness, one essential consideration should be the extent of the harm caused by the defendant.").

If the dissents in *Booth* and *Mills* provide an accurate indication, a majority of this Court may now feel that the impact of a victim's death upon his community and family is an appropriate sentencing consideration. *Mills*, 108 S.Ct. at 1875 (Rehnquist C.J., dissenting); *Booth*, 107 S.Ct. at 2539 and 2542 (White and Scalia, JJ., dissenting). Although that question is not presented by this case, it may be supposed that its ultimate resolution will involve defining the degree of foreknowledge of that impact a defendant must possess. *See*, e.g., *Tison* v. *Arizona*, 481 U.S. 137 (1987), and *Enmund* v. *Florida*, *supra*.

This would not have been an issue in *Booth* and *Mills*. Booth knew his victims, an elderly couple who could identify him, and that is why he killed them. *Booth*, 107 S.Ct. at 2530. Similarly, Mills murdered his cellmate after having threatened to do so several weeks earlier if numerous unspecified "demands" were not met by the prison warden. *Mills*, 108 S.Ct. at 1873 (Rehnquist, C.J., dissenting). In both cases, the defendants were acquainted with their victims prior to the murders, and the relationships significantly influenced their decisions to kill.

The South Carolina Supreme Court vacated Gathers' death sentence becuase the solicitor argued that Haynes' personal characteristics justified the imposition of that penalty. No error was found in his references to the impact of Haynes' death upon his family:

> This defendant, Demetrius Gathers—and if you were to decide this case based on sympathy—and, of course, that is not the way to do it—but looking at Reverend Minister Haynes and his family and his situation, you would sentence this defendant to death in a minute. But you don't do it that way.
>
> * * *
>
> [W]ith little thought, with not thought, as to Reverend Haynes' rights, as to Reverend Haynes' family, [Gathers] goes back and goes to the 20th Century Fox nightclub. Goes to sleep that night. I am sure he slept very peacefully . . . .

[J.A. 39, 41].

The defense also suggested that social and family suffering militated against a death sentence: "The real question, ladies and gentlemen, is where will the pain end? The pain for society, the pain for the victim's family, and the pain for the family of the defendant?" [J.A. 46].

A victim's personal characteristics, on the other hand, are not consequences of a murder. They exist apart from the defendant's intervention. If unknown or otherwise irrelevant to the decision to kill, they fail to illuminate the defendant's personal responsibility and moral guilt. The goal of such evidence and argument is to accomplish precisely the opposite effect, to shift the attention of the sentencing authority away from the defendant.

Its purpose, as the *Booth* majority correctly recognized, is to obtain a death sentence for no other reason than the sentencing authority's "perception that the victim was a sterling member of the community." *Booth*, 107 S.Ct. at 2534. Allowing the sentencing decision to depend upon such factors, when there exists no meaningful and significant nexus between those traits and the defendant's decision to kill, cannot be reconciled with the basic concerns and focus of this Court's Eighth Amendment jurisprudence since *Furman*.

Since the punishment of death is "a punishment different from all other sanctions in kind rather than degree," *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell and Stevens, JJ.), "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* The discretion of the sentencing body must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* v. *Georgia*, 428 U.S. 153 189 (1976) (opinion of Stewart, Powell and Stevens, JJ.). The decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion." *Zant* v. *Stephens*, *supra*, 462 U.S. at 885 (1983), quoting *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977).

Accordingly, this Court has required the sentencing authority to focus upon the character and record of the defendant and the circumstances of the crime determining the sentence. *California* v. *Ramos*, (1983); *Zant; Eddings* v. *Oklahoma, supra; Godfrey* v. *Georgia*, 446 U.S. 420 (1980) (plurality opinion); *Lockett* v. *Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Woodson; Gregg*. While mindful of "the wide scope of evidence in argument allowed at presentence hearings," *Zant*, 462 U.S. at 886, citing *Gregg*, 428 U.S. at 203-204, the Court has, on the other hand, heretofore carefully limited a capital defendant's "criminal culpability" to factors bearing upon "personal responsibility and moral guilt." *Enmund*, 458 U.S. at 801. These factors must be clear and objective. *Zant; Godfrey; Lockett; Proffitt* v. *Florida*, 428 U.S. 242 (1976) (opinion of Stewart, Powell and Stevens, JJ.); *Woodson*. Factors such as "race, religion, or political affiliation" are impermissible in the capital sentencing process. *Zant*, 462 U.S. at 885.

It is incorrect to say, as does Petitioner, that the South Carolina Supreme Court has "misconstrued" *Booth*. [Brief of Petitioner 41]. In *Gathers*, the Court read *Booth* as a logical application of these settled Eighth Amendment principles, nothing more.

The death sentence was vacated because the solicitor told the jury that Haynes' personal characteristics "cried out" for the execution of Gathers. [J.A. 43]. The extensive references to Haynes and his beliefs cannot be dismissed as a mere "thumbnail sketch . . . of the life [the defendant] choose to extinguish." *Mills*, 108 S.Ct. at 1876 (Rehnquist, C.J., dissenting).

Gathers did not know his victim and could not know, or reasonably have been charged with, knowledge of the

character traits enumerated by the solicitor. He had not been seeking out a victim; events had simply escalated in the darkness of the bicycle pathway in tragic and unpredictable fashion. The solicitor did not rely on or attempt to suggest a connection between Haynes' personal characteristics and the degree of Gathers' personal and moral accountability.

Gathers should be executed, the solicitor claimed, simply because Haynes was a "good game guy, a saint in the game of life." [J.A. 42]. He was a religious person. [J.A. 41]. He had "mental problems" and was unable to keep a regular job. [J.A. 42]. "And he wasn't blessed with fame and fortune. And he took things as they came alsong. He was prepared to deal with tragedies that he came across in his life." [J.A. 42-43]. He was a registered voter, which, the solicitor suggested, "Speaks a lot about Reverend Minister Haynes." [J.A. 43]. He believed "in this community" and in the United States of America. [*Id.*]. He believed in the legal system, a system that would protect him by executing "the likes of Demetrius Gathers." [J.A. 43-44].

Execution of Gathers was warranted, the solicitor urged, because Haynes was a devout Christian and a participant in the democratic political process. Aside from the irrelevance of these characteristics to Gathers' "criminal culpability," they are the precise sentencing factors condemned by this Court in *Zant*.

While the Court has allowed a wide range of evidence and argument in the sentencing phase, reliability has heretofore been assured by a consistent focus upon the defendant's personal and moral accountability for the murder and the elimination of irrelevant or discriminatory evidentiary variables. If the "circumstances of the

crime" were to include the personal characteristics of the victim, where those traits have played no meaningful and significant part in the defendant's decision to kill, the decision to impose a death sentence would become instead a function of such factors as the race, wealth, celebrity or beliefs of the victim. Sound Eighth Amendment jurisprudence rejects such an unwarranted and deleterious development.

B. If A Victim's Personal Characteristics Are Found To Be A Legitimate Sentencing Consideration, Gathers' Inability Under South Carolina Law To Rebut The Prosecution's Claims Of Good Character Nevertheless Prohibited The Solicitor's Argument. [Question Presented III].

If a victim's personal characteristics are a legitimate sentencing consideration in a capital trial, the defendant must be allowed to rebut evidence and claims of good character advanced by the prosecution. On this, the majority and dissenters in *Booth* agreed:

> [I]f the state is permitted to introduce evidence of the victim's personal qualities, it cannot be doubted that the defendant also must be given the chance to rebut this evidence. . . . Putting aside the strategic risks of attacking the victim's character before the jury, in appropriate cases the defendant presumably would be permitted to put on evidence that the victim was of dubious moral character, was unpopular, or was ostracized from his family.

Booth, 107 S.Ct. at 2535 (*dictum*) (footnote and citations omitted). "No doubt a capital defendant must be allowed to introduce relevant evidence in rebuttal to a victim impact statement. . . ." *Id.*, 107 S.Ct. at 2541 (White, J., dissenting). The dissenters quickly pointed out that "Maryland has in no way limited the right of defendants in this regard." *Id.*

The right has its origins in two sources. First, there is the "elemental [Fourteenth Amendment] due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." *Skipper* v. *South Carolina*, *supra*, quoting *Gardner* v. *Florida*, *supra*. Second, this Court's Eighth Amendment jurisprudence would permit a defendant to introduce evidence of the victim's bad character in mitigation. *Skipper*; *Eddings* v. *Oklahoma*, *supra*; *Lockett* v. *Ohio*, *supra*.

Unlike Maryland, South Carolina has judicially promulgated a rule of law preventing a defendant from attacking the worth of a victim in the penalty phase of a capital trial. *State* v. *Gaskins*, *supra*. If, as in this case, the solicitor eulogizes the victim in his summation, he does so without fear of contradiction, for *Gaskins* effectively precludes the defense from challenging the accuracy of his claims.

The solicitor argued that Haynes was deeply religious and a good citizen, a "good game guy, a saint in the game of life." [J.A. 42]. As discussed in the follwing section, the solicitor consistently and repeatedly misrepresented the testimony and exhibits relating to Haynes' personal characteristics. Limited by *Gaskins* to the prosecution's evidence and prevented from arguing its darker implications, the defense could assert unconvincingly that Haynes, because of his positive attributes, would have wanted Gathers to be sentenced to life imprisonment:

> I wish there were some way that Ricky Haynes could speak to us buy that is not possible. Ricky Haynes is a victim, and a victim I don't want you to forget when you go into the jury room to make the determination of sentence. Ricky Haynes has been constantly characterized as Reverend Minister Haynes. The

> clear implication is that he was a Christian. I ask you to think about what the implications of that Christian faith were and are and will be in the future.

[J.A. 45].

In *Gardner*, this Court stated, "Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." *Gardner*, 430 U.S. at 360. The effect of *Gaskins* removes the opportunity for adversarial comment. As a result, the reliability of the sentencing decision is undermined.

In *Gathers*, the South Carolina Supreme Court acknowledged the constitutional ramifications of *Gaskins*, holding that its disapproval of the solicitor's closing argument accorded with that decision. *Gathers*, 369 S.E.2d at 144. *Cf. Skipper*, 476 U.S. at 11 (Powell, J., concurring) ("I see no reason why a State could not . . . exclude evidence of a defendant's good behavior in jail following his arrest, so long as the evidence is not offered to rebut testimony or argument . . . tendered by the prosecution.").

The solicitor's closing argument was simply impermissible in this case. A determination that the South Carolina Supreme Court incorrectly interpreted the Eighth Amendment would not alter this conclusion. Gathers' inability under South Carolina law to contest the solicitor's assertions of Haynes' good character was incompatible with the right to present evidence in rebuttal and mitigation, regardless of whether a victim's personal characteristics are found to be a legitimate sentencing consideration.

C. The Solicitor's Misrepresentation Of The Evidence Relating To The Victim's Personal Characteristics Amounted To A Denial Of Due Process. [Question Presented IV].

There remains one final problem distinct from the appropriateness of the solicitor's closing argument under the Eighth Amendment and the inability of Gathers to rebut the argument under South Carolina law. The problem involves the solicitor's repeated and consistent misrepresentation of the testimony and exhibits relating to the personal characteristics of the victim.

This Court has been particularly critical of closing arguments in which the prosecutor misrepresents evidence or the procedures of capital sentencing. *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985); *Miller* v. *Pate*, 386 U.S. 1 (1967). In addition, the Court has held that appeals to factors such as race, religion or political affiliation are irrelevant and constitutionally intolerable. *Zant* v. *Stephens*, *supra*.

In this case, the solicitor stated that Haynes was religious, mentally troubled and "[u]nable to keep a regular job." [J.A. 41-42]. Haynes' mother testified to these facts. [J.A. 4-5]. However, the balance of the solicitor's portrait of Haynes was his own creation.

From the exhibits, he selected a preprinted prayercard, "The Game Guy's Prayer." [J.A. 41-42]. He read the prayer to the jury in its entirety, asserting that Haynes was "a sport in this little game of life . . . a good game guy, a saint in the game of life." [J.A. 42]. Furthermore, Haynes "took things as they came along. He was prepared to deal with tragedies that he came across in his life." [J.A. 43].

Next, the solicitor turned to the voter registration card, which, he said, "Speaks a lot about Reverend Minis-

ter Haynes. Very simple yet very profound." [*Id.*]. It revealed to the solicitor that Haynes believed "in this community [and] took part," that he believed in "the United States of America" and its legal system, a system that would protect him by executing "the likes of Demetrius Gathers." [J.A. 43-44].

In truth, there was no evidence that Haynes resembled the anonymous protagonist of "The Game Guy's Prayer." Since Haynes also carried about two Bibles, it would have been just as fair for him to have been described by the solicitor as "Job-like" or "Christ-like;" in other words, ownership did not support the argument of kinship.

At least the prayer-card was in evidence. The solicitor's description of Haynes' personal philosophy for dealing with the vagaries of day-to-day existence was apparently manufactured out of thin air, for the record discloses no basis for his claims. Similarly, there was no evidence of Haynes' political views, particularly his opinions about the legal system and how it ought to operate.

In *Donnelly* v. *DeChristoforo*, *supra*, the Court cautioned: "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *DeChristoforo*, 416 U.S. at 647. In this case, the solicitor's remarks were explicit, extensive and their import was unmistakable. *Cf. Caldwell*, 472 U.S. at 340 (Here . . . the prosecutor's remarks were quite focused, unambiguous, and strong."). By manipulation of the evidence and outright fabrication, he sought to create "the perception that the victim was a sterling member of the community." *Booth* v. *Maryland*, *supra*, 107 S.Ct. at 2534.

The relevant question is whether the solicitor's improper comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *DeChristoforo*, 416 U.S. at 643. As the South Carolina Supreme Court correctly noted, the solicitor's "extensive" comments "conveyed the suggestion [Gathers] deserved a death sentence because the victim was a religious man and a registered voter." *State* v. *Gathers*, 369 S.E.2d at 144. Thus, the solicitor not only misrepresented the evidence, he did so in a fashion that placed before the jury factors held irrelevant and constitutionally impermissible in Zant, that is, religion and political affiliation.

In addition to the nature of remarks themselves, the Court has considered whether the jury was given a curative instruction, *Darden* v. *Wainwright*, 477 U.S. 187 (1986); *Caldwell; DeChristoforo*, whether the argument was responsive to the defense summation, *Darden; Young* v. *United States*, 470 U.S. 1 (1985), whether the defense was able to rebut the prosecutor's assertions, *Darden*, the weight of the evidence against the accused, *Darden*, and the brevity of the comments in the context of the argument as a whole. *DeChristoforo*.

These factors support a finding of error. The jury was never instructed that the arguments of counsel were not evidence. Since the solicitor argued first, the remarks were not in response to defense claims. The defense was prevented from rebutting these averments by *State* v. *Gaskins*, *supra*. Finally, while the evidence of Gathers' participation in the crimes may have been "overwhelming," *Gathers*, 369 S.E.2d at 143, the degree of his personal and moral accountability was less certain.

To be sure, closing argument is the canvas of the advocate and is not limited by "debating society rules as to

relevancy." *Caldwell*, 472 U.S. at 350 (Rehnquist, J., dissenting). However, this Court has never licensed the misrepresentation of evidence or appeals to irrelevant and constitutionally impermissible factors. The solicitor's argument in this case was fundamentally incompatible with due process of law.

CONCLUSION

This brief has presented and addressed three compelling reasons why this Court should affirm the decision of the South Carolina Supreme Court in *State* v. *Gathers*, *supra*. First, the solicitor's reliance on the victim's personal characteristics in closing argument violated the Eighth Amendment. Second, South Carolina law prevented Gathers from rebutting the solicitor's claims. Third, the solicitor misrepresented the evidence of the victim's characteristics. Each factor progressively undermined the reliability of the sentencing determination. The South Carolina Supreme Court correctly vacated the sentence of death in this case.

Respectfully submitted,

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No. 88-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,
Petitioner,

versus

DEMETRIUS GATHERS,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
SOUTH CAROLINA

REPLY BRIEF FOR PETITIONER

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I.

The introduction and comment on evidence of the victim's characteristics do not violate the Eighth Amendment.

The Respondents and amici in their support contend that a victim's personal characteristics are not a consequence of the murder and fail to illuminate the defendant's personal responsibility or moral guilt. (Brief of Respondent, p. 18). We strongly disagree. The extent of harm caused by the defendant's act includes necessarily the information about a victim which was introduced and commented upon in this case. The fact that many jurors will look less favorably on a capital defendant when they appreciate the full extent of the harm caused to the victim and his family does not make its introduction "arbitrary," but instead makes the decision "individualized." Here, the

prosecution had a legitimate interest in counteracting the open-ended mitigating evidence the defendant was entitled to introduce by its argument based upon evidence the jury had before it which presented a true picture of the crime and the victim. Cf. Eddings v. Oklahoma, 455 U.S. 104 (1982). There is nothing arbitrary by reminding a sentencer that "just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." Booth v. Maryland, 482 U.S.__, 107 S.Ct. 2529, 2540 (White, J., dissenting).

II.

The Respondent's concerns about the introduction of this evidence are not supported by the record.

The Respondent and its amici express undue concern about problems arising from a defendant's rebuttal of victim character evidence. Their positions are speculative and unconnected to the facts of this case where no attempt was made to rebut this evidence. Defense counsel instead agreed with the presented facts of the victim's physical and mental status which were reasonable and foreseeable characteristics and consequences of the harm done by Gathers.

In Booth, supra, the majority expressed a concern that the introduction of victim evidence would cause the decisions to turn on whether the victims are assets to the community or sterling members of the community. This case stands for the proposition that the concerns are not realistic. The state's argument and position was

that our system of justice does not tolerate the distinctions. Here, the victim was not characterized as a sterling member of society but rather a member of society who had some mental problems who deserved equal and fair treatment from all its members. The evidence simply does not lead to the arbitrariness this Court previously associated with it. See Booth, supra, 96 L.Ed.2d 450, n. 8.

The Court's concern with a battle over the comparative social worth of a victim did not occur in this case. The fact that a victim was a non-violent person was a relevant factor when statutory mitigating circumstances exist in South Carolina law that "the victim was a participant in the defendant's conduct or consented to the act" or "the defendant was provoked by the victim into committing the murder." S.C. CODE

ANN. § 16-3-20 (C)(b)(3), (8) (1976). Clearly, evidence that could rebut such circumstances should be admissible so that the jury renders an informed or guided decision that speaks the truth.

The amount of harm one causes should bear upon a defendant's personal responsibility for the acts. A reasoned decision maker should have the opportunity to view the full picture of the event before it makes its sentencing decision. The justice system, which requires all mitigating factors presented by the defendant but silencing the evidence of human suffering and preventing a quick glimpse of the life the defendant chose to extinguish, does not allow for a balanced view of the crime. "The decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief

that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg v. Georgia, 428 U.S. 153, 184 (1976) (opinion of Stewart, Powell and Stevens, JJ.). To hold that the jury is precluded from learning who the victim was and what factors put him in a position in which he suffered from the brutality that occurred here does not find support in the Eighth Amendment. The victim did not ask to be murdered in a brutal fashion by the defendant that led to the defendant's trial of his moral responsibility. The defendant is entitled to present the decision maker with his reasons in mitigation as to why he committed the heinous act. The victim, through the prosecution, should equally be allowed to present his reasons through his own individualized

characteristics as to why he ended up being in the status of being victimized on that day. To erase the victim from the transcripts does not lead to a reasoned decision; to include the victim in the record does not lead to an arbitrary decision.

III.

The Respondent misinterprets the effect of the lower court's decision in State v. Gaskins.

The Respondent contends that State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985), precludes any testimony concerning a victim's characteristics from being introduced and would preclude the opportunity to rebut such a presentation. A close reading of the Gaskins decision does not support the broad proposition that the Respondent asserts. That case arose from a unique murder situation in which Gaskins, an

inmate, killed Rudolph Tyner, another inmate, by use of an exploding device on South Carolina's Death Row. Testimony was presented to the jury that Tyner had been sentenced to death for murdering the mother and step-father of Tony Cimo who contacted Gaskins concerning murdering Tyner. At trial, guilt phase evidence had already been introduced about the victim's status as a convicted murderer on death row and the crime including the tape recording wherein Gaskins described Tyner's apparent lack of remorse over the crime when he laughed about killing Cimo's mother and wanting to leave no witnesses. (State v. Gaskins, Tr. pp. 4515-4517). In the penalty phase, Gaskins' counsel sought to introduce Tyner's confession to the earlier murders in mitigation "to show the influence that was placed on Mr. Gaskins and the pressure placed ..."

allegedly as an attempt to establish a different motive for the murder than that the murder was for money, i.e., to aid Tony Cimo in his apparent efforts to end Mr. Tyner's life. Brief of Appellant, State v. Gaskins, pp. 87-88. The trial court therein refused to allow the collateral statement to be introduced but stated:

> The Court: This gentleman can testify that Mr. Cimo was upset over his parents being gunned down by Mr. Tyner in an armed robbery in Horry County.

(State v. Gaskins, Tr. p. 4364). In mitigation, the defense presented admitted testimony that Tyner was arrested and convicted of the murder of Mr. and Mrs. Moon and that Tony Cimo was distraught over what happened to his parents. (State v. Gaskins, Tr. pp. 4365-4367). Further, during the closing arguments in that case, defense counsel argued that the death penalty was not

appropriate and there was "no excuse for the death of Mr. and Mrs. Moon" nor appropriate on "Tony Cimo who is trying to avenge the death of his parents." (State v. Gaskins, Tr. p. 4399, 4402). See also State v. Gaskins, Tr. p. 4139 (guilt-phase argument of defense commenting on Tyner's "slaughter" of two old people with a shotgun and "awaiting to die in the electric chair"). Faced with those factual circumstances, the South Carolina Supreme Court made the following findings of fact and conclusions:

> At the sentencing phase of the trial, Gaskins' counsel offered in evidence a confession given by Tyner to the effect that he killed Mr. and Mrs. Moon. The confession was not allowed. It is submitted that this confession should have been admitted as a mitigating circumstance. Apparently the gist of the argument is that if he could show that Tyner should have died because of his treatment of the Moons, it would justify

> to some degree Gaskins' execution of him. Obviously, the jurors knew that the State of South Carolina had determined that Tyner should be executed. Nothing Gaskins could prove would more conclusively show that Tyner was culpable. Be that as it may, Tyner was entitled to live until the State of South Carolina carried out the order of execution. The fact that the State had conclusively found that Tyner should be executed did not entitle Gaskins to kill him. We find no error in excluding Tyner's confession.

State v. Gaskins, supra, 326 S.E.2d at 145.

Contrary to the position espoused by the Respondent, the South Carolina Supreme Court's opinion in Gaskins did not preclude the defense from challenging the evidence about the victim present in the record. In Gaskins, the defense was merely precluded from introducing additional evidence of a confession to an earlier murder by the victim, where the

uncontradicted evidence in the record was that the victim killed those two individuals and the state had decided that the victim should be executed. As the state court correctly stated: "nothing Gaskins could prove would more conclusively show that Tyner was culpable." Further, the Court properly stated that the fact that Tyner had received the death penalty did not "entitle Gaskins to kill him." The state court simply found as a matter of law that the confession of Tyner to the Moon murders was not itself a mitigating circumstance.

In State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), the state court rejected any applicability of Gaskins where references of the victim's lifestyle were directly related to competent relevant testimony concerning the crime and the facts were critical

for the jury's understanding as to why the victim was in the various places she was on the day of her abduction. Clearly, this testimony and comment were admissible under any appropriate Eighth Amendment analysis, including Booth and the Gaskins decision was not a similar situation.

It has been asserted that South Carolina law did not allow the defense to rebut the evidence presented by the defendant. Nowhere in this record was any such rebuttal evidence sought to be introduced nor was any such proffer made. The assertions that he was not permitted to explain or rebut these facts as presented at trial is simply not true. The fallacy of the Respondent's argument stands out when the trial reveals no objection to the evidence when it was introduced in the guilt phase of the trial. Similarly,

the state's guilt phase theory of the case was cogently set forth in the strikingly similar closing argument in the guilt phase. (Tr. pp. 1032-1056). Therein he also described the vicious assault on the victim, described his personal belongings and what Gathers maliciously did to them. (Tr. pp. 1053-1054). Importantly, in the guilt phase closing argument, he pointed out the testimony concerning the mental problems of the victim and that he was not a violent person and "if he were, you would hear lots about that ...." (Tr. p. 1051). Again, he described that the victim was a religious person, and his Bible, rosary beads, and statues of angels were on the scene of the murder. (Tr. pp. 1051-1052). As in the penalty phase, he described the purpose of the park and the degradation and humiliation of the victim, "a very, very small

person," suffering in pain from the assault while "they go through his belongings, his Bible, his religious papers, looking for things to steal, throwing them along the bike path." (Tr. p. 1054). At the outset of the guilt phase argument, rather than challenging these concerns, the defense counsel endorses them expressing sympathy for the mentally ill and the victim who "is helpless in every way, physically overwhelmed, and mentally handicapped, he had his problems, there is sympathy in this case for only one man, and that's Ricky Haynes." (Tr. p. 1057). No issue was raised concerning these strikingly similar portions of the guilt phase argument in the lower court, which found no error in the Solicitor's argument against other challenges or the admission of that evidence in the guilt phase. (J.A. pp. 60-61).

Contrary to the assertions, the State Supreme Court never held that this evidence was not admissible as a circumstance of the crime, but rather held the extensive comments about the victim's character were unnecessary to an understanding of the crime. (J.A. p. 66). His assertions to the contrary do not withstand close scrutiny.

IV.

The Solicitor's argument properly presented his version of the evidence presented at trial.

The Respondent's contention that the Solicitor misrepresented the evidence in his closing argument is not supported by the evidence in the record. In its Brief, the Respondent contends that there was no evidence that Reverend Minister Haynes resembled the protagonist in the "Game Guy's Prayer"

or his philosophy for dealing with life. (Brief of Respondent, pp. 25-27). Contrary to these assertions, the evidence in the record below strongly supports the reasonable inferences presented in the Solicitor's closing argument.

While the Petitioner recognizes the apparent unwillingness of the Respondent to concede this point, the evidence of the crime screams out in support of the argument. Actions of the victim emit volumes in support of his status on the evening of his murder, where unarmed he went to the park alone and sat on the park bench with his personal belongings, including his religious items. (J.A. pp. 26-27). While there, he again reflected his openness, yet vulnerable stature by changing his clothes in the park. (J.A. pp. 17, 32). It also reflects his unsuccessful attempt to

defend himself until he was pinned to the ground. (J.A. pp. 19-21). The record before the Court, information evident to Gathers who rummaged through the items and talked to the victim, supports the inferences asserted in the argument. This was not an appeal to the jury that the sentence of death be imposed on the basis of race, religion, or political affiliation. Zant v. Stephens, 462 U.S. 862, 888 (1983). Instead, it was a statement that society and its members cannot tolerate the peaceful and lawful pursuits of any of its members, including the vulnerable, in our public parks being destroyed by the brutality of violent individuals intent on making the park their own domain.

CONCLUSION

For the foregoing reasons, and for those set forth in Petitioner's opening

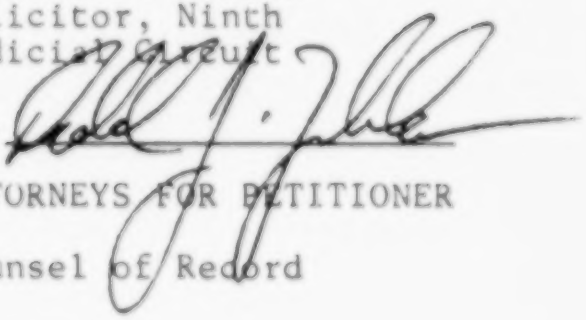
Brief, the judgment of the South Carolina Supreme Court should be reversed.

Respectfully submitted,

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No. 88-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

versus

DEMETRIUS GATHERS,

Respondent.

AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and forty copies of the Reply Brief for Petitioner in the above captioned case by depositing same with Federal Express, prepaid, and properly addressed to the Clerk of this Court.

This 2nd day of March, 1989.

Donald J. Zelenka

SWORN to before me this
2nd day of March, 1989.

(LS)
Notary Public for South Carolina
My Commission Expires: July 1995.

No. 88-305

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STATE OF SOUTH CAROLINA,

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Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Reply Brief for Petitioner on the Respondent by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to Joseph L. Savitz, III, Esquire, 1122 Lady Street, Suite 301, Columbia, South Carolina 29201. He further certifies that all parties required to be served have been served.

This 2nd day of March, 1989.

Donald J. Zelenka

SWORN to before me this
2nd day of March, 1989.

Melora Dergel (LS)
Notary Public for South Carolina
My Commission Expires: July 1991

Supreme Court, U.S.
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No. 88-305

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA, Petitioner,

v.

DEMETRIUS GATHERS, Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF OF AMICI CURIAE

State of California, Joined by the States of Alabama, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Missouri, New Jersey, New Mexico, Nevada, North Carolina, Oklahoma, Oregon, Virginia, Washington, and Wyoming, in support of the State of South Carolina, Petitioner.

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QUESTIONS PRESENTED

I. Does the Eighth Amendment preclude a prosecutor's comments during a capital murder penalty phase on personal characteristics of the victim where the characteristics are based on evidence admitted in the guilt phase to show the circumstances of the crime?

II. Does Booth v. Maryland (1987) ___U.S.___, 96 L.Ed.2d 440, preclude prosecutorial comment during a penalty phase closing argument on evidence introduced during the guilt phase of the trial that reveals personal characteristics of the victim?

III. Whether this Court's decision in Booth v. Maryland, supra, misconstrued the requirements of the Eighth Amendment and was wrongly decided?

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INTEREST OF THE AMICI CURIAE

In California, as in other states, the circumstances of the crime are a proper subject of evidence and argument in the penalty phase (Pen. Code § 190.3(a)), as bearing on the culpability of the defendant. Indeed, the circumstances of the crime are typically the primary factors relied on by a prosecutor. The circumstances of the crime frequently disclose personal characteristics of the victim which are relevant to a fair assessment of the character and personal culpability of the defendant.

This Court's decision in Booth v. Maryland (1987) ___U.S.___, 96 L.Ed.2d 440, has engendered considerable confusion among prosecutors concerning the permissible scope of evidence and prosecutorial argument in capital cases concerning the circumstances of the

crime, where such circumstances reveal personal characteristics of the victim.

The California Supreme Court has similarly demonstrated uncertainty in its efforts to construe the scope of Booth. For example, in People v. Siripongs (1988) 45 Cal.3d 548, 579-580, 247 Cal.Rptr. 729, 747-748, 754 P.2d 1306, 1324-1325, the court stated that "mere argument, without instructions on that subject, may not be prohibited by Booth." (45 Cal.3d, at p. 580, 247 Cal.Rptr. at p. 748, 754 P.2d at p. 1324, emphasis by the court.) But in People v. Hovey (1988) 44 Cal.3d 543, 577, 244 Cal.Rptr. 121, 140-141, 749 P.2d 776, 795, the court characterized the prosecutor's reference in penalty phase argument to the impact of the victim's death upon her parents as "arguably inappropriate" under Booth, even though the prosecutor's remarks "were confined

to matters already obvious to any juror." Similarly, in People v. Ghent (1987) 43 Cal.3d 739, 771, 239 Cal.Rptr. 82, 103, 739 P.2d 1250, 1271, the court stated that the prosecutor's "brief reference" to the impact of the victim's death upon her family was "arguably inappropriate" under Booth. So too, in People v. Adcox (Nov. 17, 1988; Crim. 23192/S004558) ___Cal.3d ___, ___Cal.Rptr.___, ___P.2d___), the court characterized the prosecutor's argument that in murdering the victim the defendant showed "no concern for human life or for [the victim's wife or sons] when he committed that act" as "arguably inappropriate" under Booth.

Expansive interpretations of Booth have been advocated by counsel for capital defendants. In People v. Karis (1988) 46 Cal.3d 612, 640-641, 250 Cal.Rptr. 659, 675, 758 P.2d 1189, 1205,

appellant argued that Booth precluded testimony in aggravation by a live prior victim of his assaultive conduct, on the ground it was inflammatory in the same way testimony by the victim's family is inflammatory. In rejecting this contention, the California Supreme Court stated that ". . . the impact of a capital defendant's crimes on the victims of those crimes is relevant to the penalty decision." (People v. Karis, supra, 46 Cal.3d at p. 641, 250 Cal.Rptr. at p. 675, 758 P.2d at p. 1205, fn. omitted). Yet in People v. Boyde (1988) 46 Cal.3d 212, 249 (fn. 5), 250 Cal.Rptr. 83, 104 (fn. 5), 758 P.2d 25, 46 (fn. 5), the court found "arguably improper" testimony by other actual victims of appellant, who described Boyde's conduct and "also mentioned the effect it had on them." In People v. Keenan (1988) 46 Cal.3d 478, 510 (fn. 14), 250 Cal.Rptr.

550, 570 (fn. 14), 758 P.2d 1081, 1101 (fn. 14), appellant contended that Booth precludes "unrebuttable, nonrecord inferences that he lacked remorse." More recently, in People v. Malone (Nov. 3, 1988; Crim. 23155/S004553) ___ Cal.3d ___, ___ Cal.Rptr ___, ___ P.2d ___,the court concluded that "any error" in the prosecutor's "brief and mild" request that the jury consider the feelings of the victim of a prior murder, proved as an "other crime" in aggravation under California law [Cal. Pen. Code, § 190.3, factor (b)] was harmless beyond a reasonable doubt.

Published decisions from other jurisdictions similarly reflect difficulties in understanding the scope and interpretation of Booth. See e.g. State v. Cummings (N.C. 1988) 372 S.E.2d 541, 550-551; State v. Brown (N.C. 1987) 358 S.E.2d 1, 17-18, cert. den. sub nom.

Brown v. North Carolina, ___U.S.___, 98 L.Ed.2d 406; Hunt v. State (Md. 1988) 540 A.2d 1125, 1127-1128; State v. Colvin (Md. 1988) 548 A.2d 506, 516; Daniels v. State (Ind. 1988) 528 N.E.2d 775, 782; People v. Spreitzer (Ill. 1988) 525 N.E.2d 30, 44-45, cert. den. sub nom. Spreitzer v. Illinois, ___U.S.___, 57 U.S.L.Wk. 3281; People v. Jones (Ill. 1988) 528 N.E.2d 648, 665-666; People v. Britz (Ill. 1988) 528 N.E.2d 703, 714-716; Preston v. Dugger (Fla. 1988) 531 So.2d 154, 160, stay gr. sub nom. Preston v. Florida, ___U.S.___, 101 L.Ed.2d 978; Gilmore v. Armontrout (8th Cir. 1988) 8th Cir. No. 88-1378, filed Nov. 10, 1988, ___F.2d ___, reversing 681 F.Supp. 632 (W.D.Mo. 1988).

In addition, other states have similar Booth issues which have yet to be resolved.

We believe that Booth should either be limited and clarified, or overruled as an incorrect construction of Eighth Amendment requirements.

SUMMARY OF ARGUMENT

Circumstances of the offense which are in evidence, and which reveal personal characteristics of the victim, should properly be subject to reasonable comment by the prosecutor in penalty phase argument. Such personal characteristics may be relevant to the sentencer's assessment of the gravity of the offense and the culpability of the defendant, by giving the jury ". . . a quick glimpse of the life [the defendant] chose to extinguish." (Mills v. Maryland (1988) ___U.S.___, 100 L.Ed.2d 384, 408, Rehnquist, C.J., dissenting, joined by O'Connor, Scalia and Kennedy, JJ.) Such evidence, unlike the evidence in Booth, does not pose an unacceptable risk that

the jury might ignore relevant considerations and impose the death penalty arbitrarily or capriciously. In view of the virtually unlimited scope of evidence and argument concerning the defendant's background and character which is permitted to a defendant in the capital phase, to preclude reasonable comment by the prosecutor on personal characteristics of the victim shown by the evidence of the circumstances of the offense, would be to redact and neutralize the victim, and to skew the balance in the penalty phase against the prosecution.

To the extent that Booth v. Maryland, supra, ___U.S.___, 96 L.Ed.2d 440, precludes such prosecutorial comment, we submit Booth should be reexamined and overruled, as an incorrect statement of Eighth Amendment requirements. Alternatively, this Court

should limit and clarify Booth to make clear that Booth does not preclude such prosecutorial comment.

ARGUMENT

PERSONAL CHARACTERISTICS OF THE VICTIM REVEALED BY CIRCUMSTANCES OF THE CRIME WHICH ARE IN EVIDENCE ARE A PROPER SUBJECT OF PROSECUTORIAL COMMENT, WHERE RELEVANT TO THE SENTENCER'S ASSESSMENT OF THE GRAVITY OF THE OFFENSE AND THE CULPABILITY OF THE DEFENDANT

We agree with petitioner's assertion that, "The Eighth Amendment does not require a state to redact and neutralize the victim when the properly admitted evidence reveals victim characteristics" which are themselves relevant to the sentencer's assessment of the gravity of the offense and the culpability of the defendant. (Petn. for Cert., at pp. 18-19.) To the extent that Booth v. Maryland, supra, ___U.S.___, 96 L.Ed.2d 440, concluded otherwise, we

submit Booth should be reexamined and overruled, as an incorrect statement of Eighth Amendment requirements. Alternatively, this Court should limit and clarify Booth to make clear that Booth does not preclude evidence bearing on the circumstances of the offense, which may disclose personal characteristics of the victim, and prosecutorial comment thereon.

It is axiomatic that the circumstances of the crime are a proper subject of evidence and argument based thereon.1/

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1. In California, Penal Code section 190.3 provides, in relevant part:

> ". . . In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, . . ."
> (Emphasis added.)

Neither evidence disclosing circumstances of the crime nor comment thereon should be barred simply because such evidence may reveal personal characteristics of the victim. Such personal characteristics may be quite relevant to the sentencer's assessment of the gravity of the offense and the defendant's culpability, in that it may give the jury "a quick glimpse of the life [the defendant] chose to extinguish." (Mills v. Maryland, supra,

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This section goes on to provide, in relevant part:

> "In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1." (Emphasis added.)

___U.S.___, 100 L.Ed.2d 384, 408, Rehnquist, C.J., dissenting, joined by O'Connor, Scalia and Kennedy, JJ.)

The instant case is a good example. The prosecutor referred to the religious items found around the victim, and noted that the evidence showed the victim was "a religious person." He read from the "Game Guys Prayer," one of the religious tracts found among the victim's possessions, and noted the presence of the victim's voter registration card. (Petn. for Cert., at pp. 13-14, 43-46.) The prosecutor characterized these as items respondent "could care little about when he went through" them looking for items of value to steal. (Petn. for Cert., at pp. 8, 13-14, 43-46.) The sentencer could infer from the personal characteristics of the victim shown by the circumstances of the crime that respondent's crime was particularly

aggravated and showed an individual so lacking in accepted standards of human decency that he warranted the death penalty.

Moreover, such evidence is quite unlike that in Booth, which described the effect of the murder on the family and friends of the victim and contained opinions and characterizations of the crime by family members. Even the lead opinion in Booth recognized:

> "Our disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context. Similar types of information may well be admissible because they relate directly to the circumstances of the crime. . . ." (Booth v. Maryland, supra, ___U.S. at ___, 96 L.Ed.2d at p. 451, fn. 10.)

In order for the balance to be kept true (Snyder v. Massachusetts (1934) 291 U.S. 97, 122) in capital cases, Booth

must be limited. As Chief Justice Rehnquist observed in his dissenting opinion in Mills, supra:

> ". . . Virtually no limits are placed on the mitigating evidence a capital defendant may introduce concerning his own history and circumstances, yet the State is precluded from demonstrating the loss to the victim's family, and to society as a whole, through the defendant's homicide. If a jury is to assess meaningfully the defendant's moral culpability and blameworthiness, one essential consideration should be the extent of the harm caused by the defendant. In large measure, the Court's decision in Booth prevents the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." (Mills v. Maryland, supra, ___U.S. at ___, 100 L.Ed.2d at p. 408 (dis. opn.)

Booth should be limited to the circumstances present in that case. What occurred here was quite different. Booth involved a detailed, statutorily required, Victim Impact Statement (VIS)

which provided the jury with two types of information.

> ". . . First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members' opinions and characterizations of the crimes and the defendant." (Booth v. Maryland, supra, ___U.S. at p. ___, 96 L.Ed.2d at p. 448.)

The VIS in Booth (quoted in full in the Appendix to the majority opinion in Booth) was very detailed and focused in graphic detail on how the lives of the family of the victims had been irrevocably altered by the murders.

The majority in Booth concluded such information was "irrelevant to a capital sentencing decision," and that its admission created a constitutionally unacceptable risk that the jury might impose the death penalty "in an arbitrary and capricious manner" (Booth v. Maryland, supra, ___U.S. at p. ___, 96

L.Ed.2d at p. 448), by ". . . diverting the jury's attention away from the defendant's background and record, and the circumstances of the crime." (Booth v. Maryland, supra, ___U.S. at p. ___, 96 L.Ed.2d at p. 450, emphasis added.)

There was no evidence in the instant case beyond the circumstances of the crime, and argument based thereon was not irrelevant to the capital sentencing decision, and did not pose an unacceptable risk that the jury might ignore relevant considerations and impose the death penalty arbitrarily or capriciously. Instead of diverting the jury's attention away from the circumstances of the crime, there was no evidence in the instant case apart from the circumstances of the crime, and argument based thereon was relevant to an assessment of the gravity of the offense and the moral culpability of respondent.

To preclude such argument is to redact and neutralize the victim, and to skew the balance in the penalty phase against the prosecution.[2/] Respondent was permitted in the instant case to present impassioned pleas from his family

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2. In this respect, amici urge that the proper standard is not, as the Supreme Court of South Carolina concluded, whether the prosecutor's comments were "unnecessary" to an understanding of the circumstances of the crime (Petn., Appendix A, p. 47.), but simply whether the comments were properly based on evidence before the jury concerning the circumstances of the offense.

The opinion, it must be noted, fails to suggest a test for determining what is constitutionally "necessary" to an understanding of the circumstances of the crime.

Indeed, carried to its logical conclusion, the jury's knowledge of the victim's name is "unnecessary" to an understanding of the circumstances of the crime. The accusatory pleading could refer to the victim by amorphous initials, and witnesses and the prosecutor could be similarly admonished concerning their references to the victim.

members and friends that the jury spare his life. (Petn. at pp. 11-13.) Why should it be constitutionally impermissible for the prosecutor to refer in argument to personal characteristics of the victim which are properly in evidence?

The majority in Booth also expressed concern that it would be difficult, if not impossible, to provide a fair opportunity for the defendant "to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant. . . ." (Booth v. Maryland, supra, ___U.S. at p. ___, 96 L.Ed.2d at pp. 450-451.) In the instant case, the argument was based on evidence already before the jury, and it was not unfair to require respondent to meet argument based on such evidence. Nor did such argument shift the focus of the sentencing hearing away from the

defendant, since the argument was relevant to the jury's assessment of the gravity of the crime and respondent's moral culpability.

However, amici would also question why the focus of the sentencing hearing must be exclusively on the defendant, as the quoted language from the majority opinion in Booth appears to suggest. The majority opinion in Booth stated:

> "While the full range of foreseeable consequences of a defendant's actions may be relevant in other criminal and civil contexts, we cannot agree that it is relevant in the unique circumstance of a capital sentencing hearing. . . ." (Booth v. Maryland, supra, ___U.S. at p. ___, 96 L.Ed.2d at p. 449.)

The majority opinion in Booth offered no authority in support of this suggestion. The majority cited only Witherspoon v. Illinois (1968) 391 U.S. 510, 519, for the proposition that it is

the function of the sentencing jury to "express the conscience of the community on the ultimate question of life or death," and the plurality opinion of Justices Stewart, Powell and Stevens in Woodson v. North Carolina (1976) 428 U.S. 280, 304, for the proposition that in carrying out this task the jury is required to focus on the defendant as a "'uniquely individual human bein[g].'" (Booth v. Maryland, supra, ___U.S. at p. ___, 96 L.Ed.2d at p. 449.)

But in expressing the "conscience of the community" (Witherspoon), the jury should be able to consider the personal characteristics of the victim, to the extent revealed by evidence properly before the jury as bearing on the circumstances of the crime. Similarly, while the jury must, of course, consider the background and character of the individual defendant, it

should not be precluded from considering personal characteristics of the victim shown by the evidence properly before the jury. Nothing in Woodson requires a jury to focus exclusively on the defendant, and to ignore entirely other relevant considerations shown by the evidence. Indeed, the plurality opinion in Woodson stated:

> ". . . A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." (Woodson v. North Carolina, supra, 428 U.S. at p. 304, emphasis added.)

The victim is entitled to at least equal dignity as a unique human being. Personal characteristics of the victim disclosed by the evidence of the circumstances of the offense properly before the jury need not be totally ignored by the prosecutor in argument. The crime need not be treated as a hypothetical construct, and the victim need not be portrayed as no more than a member "of a faceless, undifferentiated mass" to whom the jury simply applies legal abstractions called instructions.

No doubt the jury must include consideration of "the character and record of the individual offender" (Woodson v. North Carolina, supra, 428 U.S. at p. 304), but amici submit that the majority went too far in Booth in suggesting that other considerations are not "relevant" in the penalty phase.

There are legitimate interests of the victim's family, and of society as a whole, which are not irrelevant to the jury's proper assessment of penalty. To the extent that Booth suggests that a prosecutor may make no reference to such interests, and that a jury may not consider them, we submit Booth is an incorrect interpretation of Eighth Amendment requirements. As Justice Blackmun was moved to observe in his dissenting opinion in Furman v. Georgia (1972) 408 U.S. 238, 413-414:

> "It is not without interest, also, to note that, although the several concurring opinions acknowledge the heinous and atrocious character of the offenses committed by the petitioners, none of those opinions makes reference to the misery the petitioners' crimes occasioned to the victims, to the families of the victims, and to the communities where the offenses took place. The arguments for the respective petitioners, particularly the oral arguments, were similarly and curiously devoid of

reference to the victims. There is risk, of course, in a comment such as this, for it opens one to the charge of emphasizing the retributive. But see Williams v. New York, 337 U.S. 241, 248, 93 L Ed 1337, 1342, 69 S Ct 1079 (1949). Nevertheless, these cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked. . . ." (Emphasis added.)

The majority opinion in Booth further argued that the character and reputation of the victim and the effect on his family,

> ". . . may be wholly unrelated to the blameworthiness of a particular defendant. As our cases have shown, the defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family." (Booth v. Maryland, supra, ___U.S. at p. ___, 96 L.Ed.2d at p. 449.

This may be true in some situations. But at least where it is not

"wholly unrelated" to the blameworthiness of the particular defendant, prosecutorial comment concerning personal characteristics of the victim shown by the evidence before the jury should be permissible. The facts to which the prosecutor made reference in his argument to the jury in the instant case were all facts known to respondent. That Reverend Minister Haynes "was a religious person" must have been apparent to respondent, since the victim's religious items and Bibles were found laying next to his body. (Petn. at p. 10.) Respondent went through those very items looking for something of value to steal. The same was true of the voter card and the Game Guys Prayer.

These circumstances were not irrelevant to the penalty determination. To the contrary, as the prosecutor argued, such evidence suggested

respondent was callously unconcerned about such matters, and "could care little about the fact that he is a religious person. Cared little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks." (Petn. at pp. 13-14, citing Tr. at pp. 1207-1208.) As petitioner argues in its petition, the evidence revealed the religious effects of the victim were "maliciously scattered around the victim's body by the defendant after he had rejected them as not worthy of theft." (Petn. at p. 19.) Thus, rather than deflecting attention from respondent's moral blameworthiness, the evidence and argument in this case in fact served to focus the jury's attention on exactly that. _

Amicus urges that Booth should be overruled or clarified and limited, in order to restore a proper balance to

penalty phase proceedings in capital cases.

* * *

CONCLUSION

Prosecutorial comment on personal characteristics of the victim disclosed by evidence properly before the jury concerning the circumstances of the crime should be permissible. Booth v. Maryland, supra, ___U.S.___, 96 L.Ed.2d 440, should be overruled or clarified and limited accordingly.

DATED: December 6, 1988

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

No. 88-305

STATE OF SOUTH CAROLINA, Petitioner,

v.

DEMETRIUS GATHERS, Respondent.

MICHAEL D. WELLINGTON, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 110 West A Street, Suite 700, San Diego, California, 92101; that on December 1, 1988, he caused to be served a true copy of the attached Brief of the State of California, joined by the states of Alabama, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Missouri, New Jersey, New Mexico, Nevada, North Carolina, Oklahoma, Oregon, Virginia, Washington, and Wyoming, as Amici Curiae in the above-entitled matter, on counsel for petitioner and

counsel for respondent by placing same in an envelope addressed as follows:

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Said envelope was then sealed and deposited in the United States mail at San Diego, California, with the postage thereon fully prepaid.

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Subscribed and sworn to before me this 12 day of December, 1988.

Notary Public in and for said County and State

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No. 88-305

Supreme Court, U.S.
FILED
DEC 8 1988
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

v.

DEMETRIUS GATHERS,

Respondent.

On Writ of Certiorari
to the Supreme Court of South Carolina

BRIEF FOR AMICUS CURIAE THE MID-AMERICA LEGAL FOUNDATION

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No. 88-305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

v.

DEMETRIUS GATHERS,

Respondent.

On Writ of Certiorari
to the Supreme Court of South Carolina

BRIEF FOR AMICUS CURIAE THE MID-AMERICA LEGAL FOUNDATION

INTRODUCTION

The Mid-America Legal Foundation, as *amicus curiae*, files this brief in support of the State of South Carolina and respectfully urges this Honorable Court, in reversing the decision of the Supreme Court of South Carolina in the case at bar, to overrule or profoundly limit its own holding in *Booth v. Maryland*, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).

INTEREST OF AMICUS CURIAE

The Mid-America Legal Foundation ("MALF") is a national nonprofit public interest law center which undertakes litigation, administrative proceedings, legal studies,

and educational activities in matters promoting political, economic, and civil liberties; preserving constitutional government, including the separation and limitation of governmental powers; and defending the rights of innocent victims of crime.

MALF has a deep interest in the American criminal justice system and works to enhance its fairness and efficacy. MALF firmly supports the principles that criminal proceedings should properly take into account the effects of crime upon its victims; that punishment should be justly proportional to the wrongs that compel it and should serve effectively to deter and prevent future crimes; and that punishment should be determined in accordance with the totality of circumstances surrounding a case.

Punishment should thus reflect the moral and prudential concerns that underlie our criminal law, and it is the office primarily of Congress, State legislatures, and citizen juries, rather than the judiciary, to voice the moral sensibilities of the community that define those concerns. In pursuit of these views, MALF participates as an *amicus curiae* in leading cases affecting rights of victims of crimes, including *Cooper v. State of Indiana*, Ind.S.Ct. (No. 45S00-8701-CR-61) (*amicus* brief filed November 10, 1988), a case presenting the question of whether this Court's holding in *Booth v. Maryland*, *supra*, forbids the introduction of victim-impact evidence in the sentencing phase of a capital case tried to a judge without a jury.

STATEMENT

On Saturday, September 13, 1986, Richard Haynes left his mother's house in Charleston, South Carolina, to walk in a public park. Haynes, a thirty-two year old physically slight and mentally infirm man, was a self-proclaimed "Reverend Minister" who frequently preached to strangers, habitually carrying with him for that purpose various religious items such as Bibles, rosaries, statues, and religious tracts.

That evening, Respondent Demetrius Gathers and three of his confederates came upon Haynes near a park bench upon which were set out his religious items. Without provocation Gathers and the others brutally attacked Haynes. Gathers first punched and then knocked Haynes to the ground, where he was kicked and beaten. Gathers then repeatedly beat Haynes on the head, first with a bottle, and once that had broken, with an umbrella. As the others began to depart, Gathers assaulted the semiconscious victim with the umbrella, pulling down Haynes's pants and pushing the umbrella tip into the victim's anus. Before leaving, Gathers and another ransacked Haynes's possessions in search of something to steal, strewing the rejected religious items around the prostrate victim.

Some time later the four assailants returned to the scene from a nearby apartment complex. Gathers approached the still prostrate Haynes and stabbed him to death. None of these facts is now in dispute.

Gathers was indicted, tried and convicted by a jury of murder and first degree criminal sexual conduct. During the subsequent penalty hearing before the same jury, the defense presented testimony from an expert, as well as from Gathers's mother, sister, cousin, and school teacher in mitigation. The State reintroduced without objection the evidence it had earlier presented during the guilt phase of the trial.

In his closing argument the prosecutor reminded the jury of what it already knew: The victim had been a physically and mentally vulnerable person. He was a religious man whose spiritual precepts – including the "Game Guy's Prayer" – led him to accept life's painful visitations without resistance. He put faith and trust in other people; he believed in his community.

After receiving instructions, the jury unanimously recommended the death penalty, whereupon the judge sentenced Gathers to death.

Gathers's conviction and sentence were reviewed on appeal by the South Carolina Supreme Court. That court upheld the conviction but reversed the sentence, remanding for a new penalty hearing. *State v. Gathers*, ___ S.C. ___, 369 S.E.2d 140 (1988). Relying upon this Court's decision in *Booth v. Maryland*, *supra*, the South Carolina Supreme Court held that the Eighth Amendment had been violated when the prosecutor commented, during closing arguments at the penalty hearing, upon the victim's personal characteristics.

ARGUMENT

I. THE SOUTH CAROLINA SUPREME COURT HAS DEVISED AND APPLIED A READING OF THIS COURT'S HOLDING IN *BOOTH v. MARYLAND* THAT IS NOT COMMANDED BY THIS COURT'S DECISION IN THAT CASE. *BOOTH* IS SO SUSCEPTIBLE TO ERRONEOUS INTERPRETATION THAT IT SHOULD BE LIMITED SEVERELY OR OVERRULED ALTOGETHER.

The South Carolina Supreme Court concluded that this Court's decision in *Booth v. Maryland*, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), compelled it to reverse the death sentence imposed upon Demetrius Gathers in the instant case. As the South Carolina tribunal read this Court's handiwork,

> In *Booth*, the United States Supreme Court held [that] the victim's personal characteristics are not proper sentencing considerations in a capital case.

State v. Gathers, ___ S.C. ___, ___, 369 S.E.2d 140, 144 (1988).

In *Booth* the introduction in the penalty phase of a murder trial of a victim impact statement allowed by

statute led to the invalidation of a capital sentence. The victim impact statement in *Booth* consisted of descriptions of the victims and of the emotional trauma suffered by their survivors, and the survivors' opinions and characterizations of the crimes and their author. By contrast, no victim impact statement or any other "formal presentation", *Booth*, 482 U.S. ___, 107 S.Ct. at 2536, 96 L.Ed.2d at 452, was presented to the jury in the case at bar. Instead, during the penalty phase the prosecutor simply rehearsed evidence that the victim was a physically slight, mentally feeble, self-proclaimed minister who preached to strangers and who habitually carried the religious items that his murderers scattered around his body in their search for something to steal.

The prosecutor's comments – based upon evidence relating to the circumstances of the crime which properly had been introduced before the same jury during the guilt phase of the trial – contained no reference to the effect the murder had upon the victim's family or upon the community, nor did they convey the family's opinions of the crime or of the victim's murderers. "At most, this thumbnail sketch . . . gave the jury a quick glimpse of the life [respondent] chose to extinguish." *Mills v. Maryland*, 486 U.S. ___, ___, 108 S.Ct. 1860, 1876, 100 L.Ed.2d 384, 408 (1988) (Rehnquist, C.J., dissenting). If anything, the prosecutor's words, including his recitation of the "Game Guy's Prayer" so beloved by the victim, served to show the jury that Gathers's brutality was thoroughly gratuitous, having been inflicted upon a victim capable of, and inclined toward, little resistance. This evidence went as much to the circumstances of the crime and to the murderer's nature as it did to the impact of the crime upon the victim and his world.

In short, the South Carolina Supreme Court disregarded the salient factual differences distinguishing *Booth* from the instant case. But perhaps the South Carolina tri-

bunal's error is understandable in light of the fact that this Court's majority opinion in *Booth* placed no limitations on the sweeping holding it announced. On the contrary, the majority brushed aside its own limiting rationale when, after holding that only information which bears upon an inquiry into the defendant's "personal responsibility and moral guilt" may be placed before the jury, *Booth*, 482 U.S. at ___, 107 S.Ct. at 2532-33, 96 L.Ed.2d at 448, it nevertheless excluded information about the victim which it conceded might well be relevant to that permitted inquiry.

The South Carolina Supreme Court was invited by the incaution of this Court to draw the broadest possible rule from *Booth*. It should not be surprising that it did so. This Court's majority in *Booth*, after all, did write that, "we thus reject the contention that the presence or absence of emotional distress of the victim's family, *or the victim's personal characteristics*, are proper considerations in a capital case." *Booth*, *supra*, 482 U.S. at ___, 107 S.Ct. at 2535, 96 L.Ed.2d at 451 (*emphasis added*). And the majority insisted that this was so even as it conceded that some information about the victim or his famly might directly bear upon the murderer's blameworthiness. *Booth*, *supra*, 482 U.S. at ___, 107 S.Ct. at 2534, 96 L.Ed.2d at 450. The South Carolina Supreme Court has uncritically applied an expansive and exaggerated, but nonetheless plausible, reading of *Booth* to the facts of the instant case, with the anomalous result that evidence which is admissible during the guilt phase of the trial cannot be introduced or commented upon during the penalty hearing.

Booth is flawed because its holding lacks principled limitations, and so will lead to perverse results such as that reached below. It is already misleading other courts, who are scrambling to understand *Booth* and to apply it faithfully. The Supreme Court of Indiana is being asked to read *Booth* to compel the total exclusion of all victim impact evidence from the sentencing phase of a capital case

being tried solely to a bench, without a jury. *Cooper v. State of Indiana*; Ind. S.Ct., No. 45S00-8701-CR-61, Brief of Appellant 87-90 (filed September 6, 1988). That question has already vexed courts in other States, which thus far appear to be resisting the imposition of jury rules upon bench sentencings. *People v. Crews*, 122 Ill.2d 266, 19 Ill. Dec. 308, 522 N.E.2d 1167 (1988); *State v. Keith*, ___ Mont. ___, 754 P.2d 474 (1988).

It is increasingly difficult to limit apprehension as to the mischief that *Booth* may cause. If this Court's majority truly meant to exclude consideration of a victim's personal characteristics in imposing a sentence of death, does that mean that Congress and the State legislatures are absolutely barred from making the murder of a child, a prison guard, a police officer, a legislator, a President of the United States, or a justice of the United States Supreme Court a capital offense? After all, the only thing that distinguishes these crimes from other killings is "the victim's personal characteristics."

This Court could not have meant what it said. Lower courts and those who administer the criminal justice system are thus left trying to reconcile as best they can the conflicting meanings inherent in a vague, yet ambitious, judicial pronouncement. It is ironic that this Court, when it sits, as in *Booth*, baldly as a legislature, is no less susceptible than are the legislatures that the people have established to the temptations of arbitrariness, ambiguity, and overbreadth.

II. THIS COURT'S DECISION IN *BOOTH v. MARYLAND* MISCONSTRUED THE REQUIREMENTS OF THE EIGHTH AMENDMENT AND WAS WRONGLY DECIDED.

More than merely a case of careless craftsmanship, *Booth's* premises and reasoning are fundamentally wrong. The new rule which *Booth* creates is an unwarranted intru-

sion into the substantive criminal law, especially into the important roles played by legislatures and juries in shaping and applying that law, as recognized in this Court's Eighth Amendment jurisprudence. *Booth* stands at odds with that jurisprudence, and should be overruled.

The Eighth Amendment to the United States Constitution commands, in pertinent part, that "cruel and unusual punishment [shall not be] inflicted." Central to the application of this command is a determination of contemporary standards regarding the infliction of punishment. *Woodson v. North Carolina* 428 U.S. 280, 288 (1976). "Legislative judgment weighs heavily in ascertaining such standards." *Gregg v. Georgia*, 428 U.S. 153, 175 (1976). Deference is owed to legislative decisions for a further reason: "[I]n a democratic society legislators, not courts, are constituted to respond to the will and consequently the moral values of the people." *Gregg, supra.* Therefore:

> Caution is necessary lest this Court become, 'under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility... throughout the country.'

Gregg, 428 U.S. at 176.

The principle of deference to state legislative judgments has guided this Court in its major decisions construing the prohibition on cruel and unusual punishment. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 179-82 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 297-99 (1976); *Tison v. Arizona*, ___ U.S. ___, ___, 107 S.Ct. 1676, 1684-85, 95 L.Ed.2d 127, 141-143 (1987). *Booth* barely paid lip service to this principle. No inquiry into legislative decisions of the type conducted in *Gregg*, *Woodson*, or *Tison* was undertaken. All that the majority in *Booth* did was to note in passing that "at least 36 states permit the use [of] victim impact statements in some contexts, reflecting a legislative judgment that the effect of the crime on the victims should

have a place in the criminal justice system". *Booth*, 482 U.S. at ___, n.12, 107 S.Ct. at 2536, n.12, 96 L.Ed.2d at 452, n.12[1]

This clear evidence of legislative judgment was not permitted to deflect the *Booth* majority from its conclusion that consideration of the impact of the crime on the victim is "constitutionally impermissible or totally irrelevant to the sentencing process." *Booth*, 482 U.S. at ___, 107 S. Ct. at 2529, 96 L.Ed.2d at 448.

The rule announced in *Booth* not only lies athwart the mainstream of legislative judgments regarding the role of victims in the criminal justice system, it also flies in the face of traditional concepts of culpability in the criminal law. *Booth* stands for the proposition that the *only* permissible considerations are those bearing upon the murderer's "personal responsibility and moral guilt." Under this view harm does not matter, because contemplation of the harm caused diverts attention from "individualized" consideration of the defendant and his mental state, and thus presumably leads to the imposition of arbitrary and capricious penalties.

But it is axiomatic that "the criminal law attributes major significance to the harm actually caused by a defendant's conduct, as distinguished from the harm intended or risked." S. Schulhofer, "Harm and Punishment: A Cri-

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[1] As of August 1987, 48 States had statutes allowing victim involvement in sentencing and 47 States had statutes permitting victim impact statements to be introduced for consideration during sentencing. Young, "A Constitutional Amendment for Victims of Crime: the Victim's Perspective", 34 WAYNE L. REV. 51, 62 (Fall 1987). Congress, having also concluded that victim impact statements are "useful tools in determining equitable penalties during the sentencing of a convicted offender," Omnibus Victim's Protection Act: Hearing on S.2420 Before the Subcommittee on Criminal Law of the Senate Committee on the judiciary, 97th Cong., 2d Sess. 55 (1982), had earlier passed similar legislation at the Federal level.

tique of Emphasis on the Results of Conduct in the Criminal Law", 122 U.PA.L. REV. 1497 (1974). In fact, actual damage was once a prerequisite to the existence of a crime. F. Pollack & F. Maitland, The HISTORY OF ENGLISH LAW 508 n.4 (2d ed. 1959); 3 J. Stephen, HISTORY OF CRIMINAL LAW 311-12 (1883). Commentators have long recognized that the structure of the criminal law reflects the notion that culpability cannot be measured solely by conduct and state of mind, but must also encompass the harm caused. R. Pilon, *Criminal Remedies: Restitution, Punishment, or Both?* 88 ETHICS 348 (1978); H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY, 130-132, 234 (1968); R. Nozick, PHILOSOPHICAL EXPLANATIONS 363 (1981); R. Nozick, ANARCHY, STATE AND UTOPIA 59-63 (1974); G. Fletcher, RETHINKING CRIMINAL LAW (1978) (continental legal systems embody the same considerations); J. Hall, GENERAL PRINCIPLES OF CRIMINAL LAW 221-22 (2d ed. 1960); E. van den Haag, PUNISHING CRIMINALS 27-28, 192 (1975); Model Penal Code § 2.03.

Harm, like *mens rea*, is an essential consideration in criminal punishment. This is so because, as the dissent recognized in *Tison*, "the social purposes that the Court has said justify the death penalty – retribution and deterrence – are justifications that possess inadequate self-limiting principles." *Tison v. Arizona*, ___ U.S. ___, ___, 107 S.Ct. 1676, 1699, 95 L.Ed.2d 127, 158 (1987) (Brennan, J., dissenting). Just as a *mens rea* requirement eases the rigors of a mechanical *lex talionis*, so harm can provide a limiting principle for an otherwise unameliorated theory of deterrence: "no punishment must cause more misery than the offense unchecked." H. Hart, PUNISHMENT AND RESPONSIBILITY 76 (1968), quoted in *Tison*, *supra*, n. 18.[2]

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[2] Harm thus provides one of the central guideposts for the principle of proportionality in criminal punishment that finds expression in the Eighth Amendment: "the States may not impose punishment that is disproportionate *to the severity of the offense* or

(Footnote continued on the following page)

Harm is not the only consideration which *Booth* would banish from the sentencing process. Application of the rule enunciated in *Booth* – that the sentencer must focus solely upon the defendant's "personal responsibility and moral guilt" – would create a narrow and rigid sentencing procedure in which no other consideration, no matter how important it is deemed by the state, could receive any regard. But this Court's decisions make clear that no such narrow and rigid rule is required by the Eighth Amendment. Instead, they make clear that a legislature may highlight, and a jury is free to consider, factors which do not focus solely on the defendant's "personal responsibility and moral guilt."

Since *Gregg*, this Court's Eighth Amendment decisions have been primarily directed toward ensuring that a State has established procedures by which "the jury is given guidance regarding the factors about the crime and the defendant *that the State, representing organized society, deems particularly relevant to the sentencing decision.*" *Gregg*, 428 U.S. at 192 (*emphasis added*). In *Gregg* and the opinions which have followed it, this Court has displayed a proper reluctance to "dictate to the State the particular *substantive* factors that should be deemed relevant to the capital sentencing decision." *California v. Ramos*, 463 U.S. 992, 999 (1982).

Three restrictions have been placed upon the States. First, *Gregg* indicated that the State must establish procedures which would narrow the class of murderers eligible for the death penalty. Second, *Woodson* established that the sentencer must be permitted to consider (not required to consider *only*) the individual characteristics

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2 *(Continued)*
to the individuals own conduct and culpability." *Tison*, *supra* (emphasis added). *See Coker v. Georgia*, 433 U.S. 584 (1977).

of the defendant and the crime.[3] Third, *Tison* established the threshold level of mental state (reckless indifference to human life when coupled with substantial participation in its extinction) required before a defendant can be made eligible for the death penalty. Beyond these restrictions, "the Court has deferred to the State's choice of substantive factors relevant to the penalty determination." *California v. Ramos*, 563 U.S. 992, 1001 (1982).

This Court has upheld a number of State statutes which have responded to the first, or *Gregg*, requirement, generally by enumerating certain "aggravating factors", at least one of which must be found to exist by the jury before a defendant may be considered eligible for the death penalty. Many, if not most, of these statutory aggravating factors do not appear designed to make eligible for execution those murderers whose crimes indicate enhanced "personal responsibility and moral guilt," but rather, those whose crimes have caused or threatened greater harm to or disruption of the fabric of society and the legal order.[4]

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[3] This second requirement was later elaborated to mean that the jury may not be precluded from considering, as a mitigating factor, any relevant evidence which the defendant wishes to put forward. *Lockett v. Ohio*, 438 U.S. 586 (1978); *See Sumner v. Shuman*, ___ U.S. ___, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987).

[4] *California v. Ramos*, 463 U.S. 992 (1983) (defendant committed murder during the course of a robbery); *Barclay v. Florida*, 463 U.S. 939 (1983) (defendant knowingly created a great risk of death to many persons; committed murder while engaged in kidnapping; had endeavored to disrupt governmental functions and law enforcement); *Barefoot v. Estelle* 463 U.S. 880 (1983) (murder committed by defendant who probably would commit in the future criminal acts of violence that would constitute a continuing threat to society); *Zant v. Stephens*, 462 U.S. 862 (1983) (murder committed by prison escapee); *Roberts v. Louisiana*, 431 U.S. 663 (1977) (murder of a police officer performing his regular duties); *Jurek v. Texas*, 428 U.S. 262 (1976) (same as *Barefoot*, *supra*); *Gregg v. Georgia*, 428 U.S. 153 (1976) (murder committed during course of armed robbery).

Legislatures have often chosen, then, to proclaim as most blameworthy those defendants who are most dangerous or harmful – not necessarily those most morally guilty, *i.e.*, those with the most purposeful mental states. There is nothing amiss in this legislative judgment:

> People may commit premeditated murder for nonrecurring personal reasons. But murders committed in the course of other serious crimes portend more victims or more crimes, and often provoke responses from victims, bystanders, and police so as to generate a widening circle of violence and disorder.

R. Weisberg, "Deregulating Death", 1983 SUP.CT.REV. 305, 330. Such legislative determinations would presumably fail to pass muster under *Booth*.

In the same way that the rule in *Booth* would narrow the range of sentencing factors a legislature may prescribe, it would also unduly restrict the information the jury may hear in exercising its guided discretion during sentencing. The Eighth Amendment does not require such restriction, as this Court's decisions make clear. In *Gregg*, the plurality stated:

> The petitioner objects, finally, to the wide scope of evidence and argument allowed at presentence hearings. We think the Georgia Court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument.

Gregg, 428 U.S. at 203.

This Court has repeatedly held that, so long as one valid statutory aggravating factor exists, a jury may properly consider "countless considerations", *Zant v. Stephens*, 462 U.S. 862, 900 (1982), beyond those specified as statutory aggravating factors in deciding whether a defendant who is eligible for the death penalty should receive it. *Zant*, *supra*, 462 U.S. at 879; *California v. Ramos*, 463 U.S. 992 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983). In so

holding, this Court's precedents have recognized, as *Booth* does not, that there is a "fundamental difference between the nature of the guilt/innocence determination ... and the nature of the life/death choice at the penalty phase." *Ramos*, 463 U.S. at 1007. This Court explained:

> In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crimes have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar 'central issue' from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of person eligible for the death penalty... the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment.

Ramos, 463 U.S. at 1008; *see Barclay*, 463 U.S. at 950.

Booth would blur the distinction between the guilt trial and the penalty hearing; in its view the penalty phase is a "trial" with one central issue: the moral guilt (or mental state) of the defendant. *Booth* would deny the jury the opportunity to consider any information not directly focused on this inquiry. For example, *Booth* would presumably not permit a jury to consider, as this Court did in *Ramos*, that a defendant not sentenced to death might ultimately be released into the community.

More fundamentally, acceptance of *Booth's* premises would herald a rigid and mechanical sentencing process in which the jury, unable to exercise its own morally informed discretion as the community's conscience, would apply some lifeless logarithm of moral guilt. This is not the jury's proper role:

> It is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity and flexibility into a legal system.'

McClesky v. Georgia, 481 U.S. ___, ___, 107 S.Ct 1756, 1777, 95 L.Ed.2d 262, 291 (1987) (quoting H. Kalven & H. Zeisel, THE AMERICAN JURY 498 (1966)).

This Court should reaffirm the central place of legislatures and juries in our criminal law, and reaffirm too the vitality of its own Eighth Amendment precedents, by overruling its decision in *Booth*.

CONCLUSION

Through the Cruel and Unusual Punishment Clause of the Constitution the people of the United States have authorized the courts "to judge whether certain punishments are forbidden because, despite what the current society thinks, they were forbidden under the original understanding of 'cruel and unusual,'...; or because they come within current understanding of what is 'cruel and unusual,' because of the 'evolving standards of decency' *of our national society*; but not because they are out of accord with the perceptions of decency, or of penology, or of mercy, entertained – or strongly entertained, or even held as an 'abiding conviction' – by a majority of the small and unrepresentative segment of our society that sits on this Court." *Thompson v. Oklahoma*, 487 U.S. ___, ___, 108 S.Ct. 2687, 2719, 101 L.Ed.2d 702, 744-745 (1988)(Scalia, J., *dissenting*) (emphasis added).

The question before the Court is whether or not a judge or jury, by taking into account the harm, the consequences, or the impact of a murderer's crime necessarily, and by dint of such consideration alone, imposes a cruel and unusual punishment if a sentence of death is thereafter pronounced. There is no evidence that the Framers of 1787 or the Ratifiers of 1788 thought so. There is every evidence that Congress and the State legislatures of today – the voices of the national community who, in the discharge of their offices, have provided for victim impact statements – believe that consideration in sentencing of the impact of a crime is just, moral, and constitutional.

Such a decision is for the legislatures to make. This court should recognize their authority to do so and should forightly abandon the strained and unsupportable reading that it has given to the Eighth Amendment in *Booth*.

Respectfully submitted,

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December 9, 1988

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No. 88-305

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA,
Petitioner
v.
DEMETRIUS GATHERS,
Respondent

On Writ of Certiorari to the Supreme Court of South Carolina

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION, THE REVEREND DOROTHY HAYNES, THE SUNNY VON BULOW NATIONAL VICTIM ADVOCACY CENTER, THE STEPHANIE ROPER COMMITTEE, INC., THE CRIME VICTIMS LEGAL CLINIC, PARENTS OF MURDERED CHILDREN, THE UNITY GROUP, INC., AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 36.3 of the rules of this Court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the refusal of respondent's counsel to provide consent.

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of its resources to promoting victims' rights and criminal justice reform. In 1981, WLF published a "Crime Victims Impact Statement" manual to serve as a model guide for implementation at the state level of the use of victim impact information. WLF works with other victims' rights groups, including the *amici* in this case.

Over the last 8 years, WLF has also appeared as *amicus curiae* in numerous death penalty cases before this Court and lower federal courts. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Zant v. Stephens*, 462 U.S. 862 (1983); *McCleskey v. Kemp*, 107 S. Ct. 1756 (1987). WLF also filed *amicus curiae* briefs in the district courts in the Walker spy ring cases, and participated in oral argument in *United States v. Jerry Alfred Whitworth*, No. CR 85-552 JV (N.D. Cal.), arguing that the federal death penalty for espionage can be constitutionally applied since the federal sentencing procedures meet the two constitutional requirements cited in *Furman v. Georgia*, 408 U.S. 238 (1972): 1) the federal system, unlike that of Georgia and other states at the time, has a bifurcated trial for the guilt and sentencing phase, and 2) the defendant can present whatever mitigating factors he desires before the federal judge, an experienced sentencing authority who also has available a pre-sentence report.

The Rev. Dorothy Haynes is the mother of Richard Haynes, who was brutally murdered by Demetrius Gathers, respondent in this case. Rev. Haynes testified at the guilt phase of the trial below. Her testimony, which was not objected to, included statements about the religious artifacts her son was carrying which were found near his body at the time he was murdered. The comments by the prosecutor to the same jury during the penalty phase of trial about Rev. Haynes' testimony was the cause for reversal of the capital sentence in this case.

The Sunny von Bulow National Victim Advocacy Center is a national, non-profit organization based in Fort Worth, Texas. The Center's purposes are to promote responsiveness of the criminal justice system to the rights and needs of the victims of violent crime, as well as to increase public awareness concerning the plight of crime victims through educational programs, conferences, and publications.

The Stephanie Roper Committee, Inc. is a non-profit organization based in Upper Marlboro, Maryland which was founded in 1982 by Roberta Roper, the mother of Stephanie, who was brutally kidnapped, raped, tortured, and murdered. The Stephanie Roper Committee is a victims' rights advocacy organization which has proposed legislation responsive to the needs of victims. One such proposal enacted into law was the Victim Impact Statement Law which was the subject of the challenge in *Booth v. Maryland*. The Roper Committee also filed an *amicus curiae* brief in that case.

The Crime Victims Legal Clinic is a project of the California Center on Victimology, a comprehensive crime victim service agency founded in 1985 based in San Diego, California. Among the goals of the clinic is to provide training to the legal and mental health communities who counsel and treat victims of crime; to reduce the trauma suffered by crime victims, their families, and the community in which they live; and to promote and implement the "Victim Bill of Rights."

Parents of Murdered Children (POMC), founded by the parents of Lisa Hullinger, who was murdered in 1978, is a national non-profit, self-help support organization based in Cincinnati, Ohio, with chapters nationwide.

Besides providing support for grieving parents and family members, POMC provides information about the criminal justice system, and seeks to make that system responsive to the needs of the victim's family.

The Unity Group, Inc. is a Maryland-based advocacy group for battered women and their children that urges criminal prosecution of the abuser where appropriate, provides assistance to victims, and helps make the law enforcement community and judicial system responsive to the special needs of victims of domestic violence.

The Allied Educational Foundation is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus* before this Court on a number of occasions.

All of the above-named *amici* wish to present a broader perspective of the issues in this case in order to assist this Court in its disposition. *Amici* believe that they should be entitled, as provided by law, to provide information to the sentencing authority concerning the impact of the murder upon the victim's family, regardless of whether the case is a capital one or not. Indeed, in a capital case, it is especially important for the victim's family to be able to inform the sentencing authority, whether judge or jury, about the impact that the murder has had on them, and, therefore, on society.

For the foregoing reasons, *amici curiae* respectfully request that they be allowed to participate in this case and file the annexed brief *amici curiae*. *Amici* are in a unique position to aid the Court in its consideration of the issues presented. The interests of *amici* are direct and substantial. The participation of the *amici* will facilitate the Court's thorough consideration of the issues and will bring important perspectives to bear. Accordingly, *amici* respectfully request that their motion for leave to file an *amici curiae* brief in support of petitioner be granted.

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Eighth Amendment preclude a prosecutor's comments during the penalty phase of a capital murder case on personal characteristics of the victim where the characteristics are based on evidence admitted in the guilt phase to show the circumstances of the crime?

II. Does *Booth v. Maryland*, 107 S.Ct. 2529 (1987), preclude prosecutorial comment during a penalty phase closing argument on evidence introduced during the guilt phase of the trial that reveals personal characteristics of the victim?

III. Did this Court's decision in *Booth v. Maryland* misconstrue the requirements of the Eighth Amendment and wrongly decide the case?

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BRIEF OF WASHINGTON LEGAL FOUNDATION, THE REVEREND DOROTHY HAYNES, THE SUNNY VON BULOW NATIONAL VICTIM ADVOCACY CENTER, THE STEPHANIE ROPER COMMITTEE, INC., THE CRIME VICTIMS LEGAL CLINIC, PARENTS OF MURDERED CHILDREN, THE UNITY GROUP, INC., AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF AMICI CURIAE

The interests of the *amici curiae* are set out fully in the Motion for Leave to File accompanying this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court has granted certiorari to review three closely-related questions concerning the sentencing procedure in a capital murder case. The very substance of the first two questions presented invites an inquiry as to the third, for, in essence, the Supreme Court finds itself reviewing whether it is *prejudicial error of constitutional dimension* for a jury sentencing a convicted first degree murderer to hear the prosecutor comment on evidence that the victim carried a voter registration card and was a religious person even when that evidence has already been properly admitted during the guilt phase of the trial to show the circumstances of the crime. The Supreme Court of South Carolina condemned the prosecutor's comment on the victim's personal characteristics as a violation of the Cruel and Unusual Punishments Clause of the Federal Constitution, relying on *Booth v. Maryland*, 107 S. Ct. 2529 (1987).

This Court has recognized that a bifurcated criminal trial procedure using the same jury for both verdict and sentencing, such as the one used in this case, allows the jury to consider all evidence admitted during the guilt phase of a capital case in arriving at an appropriate sentence. *Zant v. Stephens*, 462 U.S. 862, 865-66 (1983). One searches in vain for a credible challenge on grounds of procedural due process, fundamental fairness, or even basic evidentiary rules either to the jury's consideration

of such evidence when sentencing, or to fair comment on such evidence by the prosecutor. This issue is before the Court as a matter of constitutional interpretation because of *Booth's* tortuous application of the Punishments Clause to capital sentencing procedure.

We respectfully submit that the Court finds itself at this curious juncture of criminal procedure and constitutional law because of its flawed Eighth Amendment jurisprudence and the distorting effect this has had on the Court's proper role in judicial review of capital sentencing procedure. In his opinion for the Court in *McGautha v. California*, Justice Harlan warned that it would be impossible to solve "the intractable . . . problem of 'standards' which the history of capital punishment has from the beginning reflected." 402 U.S. 183, 207 (1971). In the jurisprudence developed in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), the Court has attempted this impossible task, based in large measure on the Justices' individual perceptions of "the evolving standards of decency that mark the progress of a maturing society." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion), quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

If the Court persists in its present approach, it will find itself repeatedly creating constitutional distinctions, judicially woven into the fabric of the Punishments Clause, between the minutiae of evidentiary and procedural rules presented on review of capital sentencing proceedings. A decision merely distinguishing *Booth* from the present case [1] will afford little guidance to lower

[1] *Booth* condemned a victim impact statement that addressed not only the personal characteristics of the victim, but also the impact of the murder on the victim's family and the family's opinion as to the nature of the crime and the perpetrator's potential for rehabilitation. These facts or opinions were not admitted into evidence during the guilt phase of the trial. In contrast, *Gathers* involves only a "quick glimpse of the life [the murderer] chose to extinguish," as in *Mills v. Maryland*, 108 S. Ct. 1860, 1876 (1988) (Rehnquist, C.J., dissenting), based on evidence already before the jury during the guilt phase.

courts [2] and legislatures and will not extricate the Court from its self-appointed role. Instead, the Court should belatedly heed its own recognition that "[c]aution is necessary lest this Court become, 'under the aegis of the Cruel and Unusual Punishments Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country.'" *Gregg*, 428 U.S. at 176 (plurality opinion), quoting *Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion).

Alternatively, *Booth* should be overruled because it was wrongly decided even in the context of the Court's earlier decisions construing the Punishments Clause. There is no general constitutional objection to a victim's participation in the criminal process, including sentencing proceedings. Furthermore, such participation would serve important social purposes emphasized by the Court in its earlier opinions. It is appropriate for the full measure of a murderer's responsibility for his crime to include the real harm caused to the victim and his family, not merely an abstract assessment of *mens rea*. Finally, such participation would also help to balance the kind of mitigation evidence typically offered by defendants in the sentencing phase of a capital case.

ARGUMENT

I. *BOOTH v. MARYLAND* SHOULD BE OVERRULED BECAUSE IT IS THE APOTHEOSIS OF A FLAWED JURISPRUDENCE OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE.

A. The Punishments Clause Was Originally Understood Solely As a Prohibition of Torture and Other Barbarous Punishments.

The language of the Punishments Clause originated in the English Bill of Rights of 1689, which provided: "That excessive bail ought not to be required, nor excessive

[2] *Booth's* rationale has already led to interesting results in the federal courts. In *Robison v. Maynard*, 829 F.2d 1501 (10th Cir. 1987), the court, citing *Booth*, affirmed the exclusion of *defendant's* presentation of testimony by the murder victim's relatives, who would have asked the jury *not* to impose the death penalty.

fines imposed, nor cruel and unusual punishments inflicted." This provision was incorporated verbatim into the Virginia Declaration of Rights by George Mason in 1776, and shortly thereafter found its way into the constitutions of eight other states and the Northwest Ordinance of 1787. With a minor change in wording ("shall not be" instead of "ought not to be"), it was adopted in 1791 as the Eighth Amendment.[3]

There has been some debate as to the purpose of the language about cruel and unusual punishments in the English Bill of Rights. This language was traditionally thought to have been adopted in response to the harsh punishments meted out by Lord Justice Jeffreys in the "Bloody Assize." Modern scholarship has indicated that the language more likely refers to punishments inflicted upon Titus Oates for giving perjured testimony leading to the erroneous execution of a number of supposed participants in the infamous "Popish Plot" of 1678-79.[4] "In the context of the Oates case, 'cruel and unusual' seems to have meant a severe punishment unauthorized by statute and not within the jurisdiction of the court to impose."[5]

The debate over the meaning of this language in the English Bill of Rights has become significant because all available evidence indicates that the American framers of the Punishments Clause intended it solely as a prohibition of torture and other barbarous punishments.[6] Throughout the Nineteenth Century this Court and the

[3] *Furman v. Georgia*, 408 U.S. 238, 319 (Marshall, J., concurring); Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839, 839-40 (1969).

[4] *Furman v. Georgia*, 408 U.S. at 317-18 (Marshall, J., concurring); Granucci, *supra* note 3, at 852-59; *see* R. Berger, *Death Penalties: The Supreme Court's Obstacle Course* 35-40 (1982).

[5] Granucci, *supra* note 3, at 859.

[6] *Furman v. Georgia*, 408 U.S. at 319-21 (Marshall, J., concurring); Granucci, *supra* note 3, at 840-44. Granucci attributes this American understanding to a misreading of English legal history. *Id.* at 860-65.

commentators treated the Punishments Clause as applying to methods of punishment regarded as inherently barbarous, such as burning at the stake, crucifixion or breaking on the wheel.[7] The clause was not thought to authorize judicial review of the proportionality of a punishment to the offense.

In recent years, the circumstances giving rise to this provision in the English Bill of Rights have been invoked to justify a broader conception of the Punishments Clause than the understanding of the American framers.[8] This approach is unwarranted for two reasons.

First, the only relevant original meaning is that given the clause by the people who framed and ratified it in 1791. If the English used the words in a different sense in 1689, and that meaning was unknown in America in 1791, then it can hardly bear on the original meaning of the Eighth Amendment. And the authorities are generally in agreement that the American framers understood the clause to prohibit inherently cruel methods of punishment and not those that were disproportionate to the offense.[9]

Second, it exaggerates the history of the English Clause to say that it reflects an understanding that a punishment must be proportioned to the severity of the crime. The concern in Titus Oates' case seems to have been that the punishments were unauthorized by statute or custom. At a time when petty theft was a capital offense, it strains credibility to believe that the English thought Oates' punishments disproportionately severe for a perjurer whose testimony had caused fifteen innocent men

[7] *See, e.g., In re Kemmler*, 136 U.S. 436, 446 (1890).

[8] *Solem v. Helm*, 463 U.S. 277, 284-86 (1983); *Rummel v. Estelle*, 445 U.S. 263, 288 (11980); *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 318 (1972) (Marshall, J., concurring).

[9] Granucci, *supra* note 3, at 843-44; R. Berger, *supra* note 4, at 43-45; *see Solem v. Helm*, 463 U.S. at 313 n.6 (Burger, C.J., dissenting).

to be executed. And, in fact, Oates' sentence—while criticized in some quarters—was upheld by the House of Lords a few months after the promulgation of the Declaration of Rights.[10]

In any event, America's Bill of Rights, as adopted, clearly contemplated the lawful imposition of capital punishment in the language of the Fifth Amendment [11], and the death penalty has been part of federal and state criminal law since the beginning of the Republic. Likewise, the Fourteenth Amendment, ratified in 1868, explicitly refers to the death penalty.[12]

B. Beginning With *Weems* and *Trop*, the Court Has Incorrectly Identified the Clause With the Myth of Progressive Enlightenment.

The historical approach to the Punishments Clause was abandoned when the Court began to apply a theory of progressive societal enlightenment as the basis of its jurisprudence.

In *Weems v. United States* [13], the Court expanded the meaning of the Punishments Clause beyond a limitation on the *methods* of punishment to include a review of the *proportionality* of the punishment to the crime. Weems received a sentence of *cadena temporal* for the offense of making a false entry in a government account book.[14]

[10] R. Berger, *supra*, note 4, at 37-40.

[11] "No person shall be held to answer for a *capital* . . . crime, unless on a presentment or indictment of a Grand Jury . . .; nor shall any person be subject for the same offence to be twice put in jeopardy of *life* or limb . . . nor be deprived of *life* . . . without due process of law . . . ." U.S. Const. amend. V (emphasis added).

[12] ". . . nor shall any State deprive any person of life . . . without due process of law . . . ." U.S. Const. amend. XIV, § 1.

[13] 217 U.S. 349 (1910).

[14] This punishment, imposed in the Territory of the Philippines, included twelve years of "hard and painful labor" in chains, as well as accessory penalties including lifetime surveillance by government authorities. 217 U.S. at 364-66.

Although the Court indicated that aspects of the sentence were inherently cruel, it also held that the sentence was invalid because it was disproportionately severe.[15]

Justice McKenna's opinion in *Weems* contains a well-known discussion of the need for a living constitution.[16] He concluded that the Punishments Clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378 (citations omitted). The *Harvard Law Review* praised the decision in *Weems* as "a triumph of enlightenment over history." [17]

This theory of progressive enlightenment was again invoked in *Trop v. Dulles* [18], which invalidated denationalization as a statutory sanction for desertion from the armed forces in wartime. Chief Justice Warren's plurality opinion cited *Weems* for the proposition that the Eighth Amendment was not "static" in scope, *id.* at 101, and concluded that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* The deci-

[15] 217 U.S. at 377. This holding thus adopted the position advocated in *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting) (in addition to inherently cruel methods of punishment, Clause bars "all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged"). Justice White's dissenting opinion in *Weems*, joined by Justice Holmes, vigorously disputes the notion that the Punishments Clause authorizes courts to review the proportionality of criminal sentences. 217 U.S. at 382. The practical effect of the holding in *Weems* was limited by *Badders v. United States*, 240 U.S. 391 (1916) (Holmes, J.), in which the Court eschewed a role in the case-by-case review of the proportionality of sentences to crimes.

[16] "Time works changes, [and] brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." 217 U.S. at 373. *See also id.* at 373-75.

[17] Note, *What is Cruel and Unusual Punishment*, 24 Harv. L. Rev. 54 (1910), *cited in* Granucci, *supra* note 3, at 843.

[18] 356 U.S. 86 (1958).

sion in *Trop* did not involve the issue of proportionality review, but rather whether denationalization is an inherently unconstitutional method of punishment.[19] The plurality opinion concluded that it was, because it resulted in "the total destruction of the individual's status in organized society." *Id.*

The doctrine that the Punishments Clause encompasses proportionality review, although weak in historical support, has some textual logic. It appears as part of an amendment that bars "excessive bail" and "excessive fines."[20] There is also some historical support for a concept of proportionality in the common law of England, although this concept is not clearly tied to the adoption of the Punishments Clause as part of the Eighth Amendment.[21] The opinion of the Court in *Solem v. Helm* justifies proportionality review solely on the basis of historical and textual analysis.[22]

However, the rationale stated in *Weems* and *Trop*—that the Punishments Clause must be interpreted to reflect the evolving decency of human society—is extraconstitutional in origin. It derives from doctrines of cul-

[19] The opinion acknowledged that "[s]ince wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime." 356 U.S. at 99. The opinion also stated that the death penalty "cannot be said to violate the constitutional concept of cruelty." *Id.*

[20] *See Furman v. Georgia*, 408 U.S. at 403 (Marshall, J., concurring); *O'Neil v. Vermont*, 144 U.S. at 340 (Field, J., dissenting) ("The whole inhibition [of the Eighth Amendment] is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted.")

[21] Granucci contended that the amercements clause of the Magna Carta and other common law developments prior to 1689 gave rise to a general principle of proportional punishment. Granucci, *supra* note 3, at 844-47. This aspect of his scholarship has been both criticized and defended. R. Berger, *supra* note 4, at 30-35; S. Gillers, *Berger Redux*, 92 Yale L.J. 731, 733-40 (1983).

[22] 463 U.S. at 284-90.

tural evolution that were particularly fashionable in the Nineteenth and early Twentieth Centuries.

In an influential book first published in 1920, *The Idea of Progress*, Professor J.B. Bury surveyed the intellectual history of this concept. He defined the idea of Progress as "based on an interpretation of history which regards men as slowly advancing—*pedetemtim progredientes*—in a definite and desirable direction, and infers that this progress will continue indefinitely."[23] Through doctrines such as Positivism,[24] Marxism and Social Darwinism,[25] the idea of Progress permeated the political philosophy of the time.

It is not surprising for a Court that embraced Spencer's economic doctrines in such decisions as *Lochner v. New York* also to embrace in *Weems* his doctrine of moral evolution.[26] What is surprising, however, is that a modern Court, having seen the wars and holocausts of our century, could continue to base constitutional doc-

[23] J.B. Bury, *The Idea of Progress* 5 (1932 ed.). *See also* Pineda, "Civilization and Cultural Evolution," 4 Encyclopedia Britannica 657-60 (15th ed. 1982).

[24] Comte, for example, believed that mankind had progressed through theological and metaphysical periods to a third or Positive period, which will feature "the organization of society by means of scientific sociology." This period will be controlled by "savants who will direct social life not by theological fictions but by the positive truths of science." J.B. Bury, *supra*, at 299-300. Comte is regarded as the "father" of sociology.

[25] Herbert Spencer's *Social Statics* reflects the view that principles of biological evolution apply in the moral sphere as well. Spencer "begins by arguing that the constancy of human nature, so frequently alleged, is a fallacy. For change is the law of all things." He thus concludes that "perfectability is possible." Next, he argues that "evil is not a permanent necessity. For all evil results from the non-adaptation of the organism to its conditions; this is true of everything that lives. And it is equally true that evil perpetually tends to disappear." J.B. Bury, *supra*, at 337.

[26] Justice Holmes, who joined the dissenting opinion in *Weems*, made the well-known remark in his *Lochner* dissent that the Constitution "does not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 75 (1905).

trine on the supposition that a maturing society will necessarily enjoy "evolving standards of decency." [27]

We do not ask the Court to decide that the doctrines of Comte, Marx and Spencer are wrong, even though we may have an opinion on that matter.[28] Our point is that the Framers did not embody such ideological considerations in the Punishments Clause. It is certainly appropriate for legislators to be influenced by ideological considerations. For judges, reliance on extraconstitutional ideologies should be anathema.[29]

Our opposition to an "evolving standard of decency" approach to the Punishments Clause does not mean that we believe the Court must ignore changing circumstances. Although some authorities have advocated a strictly historical approach to this clause,[30] it is certainly possible that technological changes will render methods of punish-

[27] *See* P. Johnson, *Modern Times: The World From the Twenties to the Eighties* 731 (1983):

> Darwin himself always stressed the limits of his discoveries. He discouraged those who sought to build ambitious projections on them. That was why he gave no license to the theories of the 'Social Darwinists', which terminated in Hitler's holocaust, and why he likewise brushed off Marx's attempts to appropriate Darwinism for his own theories of social determinism, which eventually produced the mass murders of Stalin, Mao Tse-tung and Pol Pot.

[28] *See* T. Sowell, *A Conflict of Visions* (1987).

[29] This was the general point of Alexander Bickel's 1969 Oliver Wendell Holmes lectures, published as A. Bickel, *The Supreme Court and the Idea of Progress* (1970). Despite some earlier antecedents, the idea of Progress did not predominate until later in the Nineteenth Century. *See* J.B. Bury, *supra* note 23, at 334-49.

[30] *See McGautha v. California*, 402 U.S. 183, 225 (1971) (Black, J., concurring) ("As an original proposition, it is by no means clear that the prohibition against cruel and unusual punishments embodied in the Eighth Amendment . . . was not limited to those punishments deemed cruel and unusual at the time of the adoption of the Bill of Rights."). Justice Holmes also supported that view, joining Justice White's dissent in *Weems v. United States*, 217 U.S. 349, 409-11, 413 (1910).

ment "cruel and unusual" today that were not so in 1791.[31] However, this would not be because the old values in the Constitution have evolved into new and better values, but that the same unchanging values are applied in a different factual situation.

C. Disregarding Justice Harlan's Warning in *McGautha*, the Court Has Improperly Used the Clause to Regulate the Procedures for Imposing Capital Punishment.

Just over a year before its *Furman* decision, the Court decided whether a jury could constitutionally impose the death penalty in a murder case without governing standards to guide its exercise of discretion. *McGautha v. California*, 402 U.S. 183 (1971). Justice Harlan, writing for the Court, emphasized the constitutional principles that should guide the exercise of judicial power in review of such cases:

> Our function is not to impose on the States, ex cathedra, what might seem to us a better system for dealing with capital cases. . . . [T]he Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court. The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected.

Id. at 195, 221 (citations omitted).

Thirteen months later this sound constitutional approach to capital sentencing procedure was cast aside for an Eighth Amendment analysis that confused courts and

[31] For example, the availability of lethal injections could make execution by hanging a cruel and unusual method of punishment in today's society. Opponents of capital punishment have taken varying positions regarding lethal injection. *See* G. Smith, *Capital Punishment 1986: Last Lines of Defense* 28-33 (1986).

legislatures and led to continued misapplication of the Eighth Amendment in subsequent cases.

The majority's *per curiam* decision in *Furman* held that the imposition of the death penalty constituted cruel and unusual punishment in violation of the Eighth Amendment, as applied to the states through the Fourteenth Amendment. 408 U.S. at 239. Each of the five separate concurring opinions arrived at the same result on different routes.

Within four years of the *Furman* decision, at least thirty-five states had reacted by enacting new death penalty statutes. In upholding a new Georgia statute in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court acknowledged that the "standards of decency" argument asserted in *Furman* had been substantially undercut by this flurry of legislative activity. *Id.* at 179 (plurality opinion).[32] But, having concluded that the death penalty was not unconstitutional *per se*, *id.* at 187 (plurality opinion), the Court persisted using the Eighth Amendment to prescribe in great detail the procedures to be followed in capital punishment cases.

D. After Initially Condemning Discretion, the Court Has Unwisely Held that the Clause Requires Open-ended Discretion to Withhold Imposition of Capital Punishment.

In two lines of cases decided after *Furman*, the Court has undermined the concern expressed in some of the concurring opinions about the excessive discretion that characterized the death penalty statutes that were declared unconstitutional. The effect of these cases is to

[32] Proponents of a living Constitution face the same risk as parents whose children may grow up in ways they did not anticipate. It could be argued that the fear of violent crime has made our society less "decent" now than it was in 1972. Public opinion, which was quite ambivalent regarding capital punishment in the early 1970's, now overwhelmingly favors its use. "Gallup polls, which showed 50 percent of Americans favoring capital punishment in 1972, recorded an increase to 72 percent by 1987 . . . ." Wash. Post, Nov. 27, 1988, at A36, col. 1.

give a jury the unbridled discretion to withhold imposition of the death penalty in any case.[33]

One of these lines of cases precludes the states from defining any category of crime, no matter how serious, for which the death penalty is mandatory. The Court began by holding that a mandatory death penalty for first-degree murder was a cruel and unusual punishment because it violated "contemporary standards regarding the infliction of punishment." *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (plurality opinion); *accord, Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976). The Court continued by holding unconstitutional a statute imposing a mandatory death penalty for the first-degree murder of a police officer engaged in the performance of his duty. *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977) (per curiam). Finally, the Court held recently that a mandatory death penalty could not be imposed for first-degree murder committed by an inmate serving a life term sentence. *Sumner v. Shuman*, 107 S. Ct. 2716 (1987).

The other line of cases requires state courts to permit jurors unlimited discretion to consider mitigating circumstances at the sentencing phase. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the plurality opinion condemned any limitations on the defendant's proffer of matters in extenuation or mitigation. The Court indicated that its ruling did not limit "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Id.* at 604, n.12. However, in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court retreated

[33] This approach has been aptly characterized as constituting an "about-face since *Furman*," which has the Court going "from pillar to post" in search of theories to invalidate the imposition of capital punishment. *Lockett v. Ohio*, 438 U.S. 586, 622 (White, J., concurring and dissenting in part, and concurring in the judgment); *id.* at 629 (Rehnquist, J., dissenting).

from this indication that mitigation evidence could be scrutinized for relevance.[34]

These two related lines of cases are squarely based upon the "evolving standards of decency" approach to the Punishments Clause.[35] Under this approach, the Court has held that the penological theory of discretionary sentencing represents the enlightened view of society and thus is constitutionally mandated in capital cases.

In *Woodson*, the plurality opinion explained this rationale as follows:

> Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment [requires this approach].

428 U.S. at 304 (citations omitted).[36]

The same rationale is also found in the *Lockett* plurality opinion, which observes at one point: "Most would

[34] There, the Court vacated a death sentence because the trial court, apparently on grounds of relevance, refused to consider certain evidence presented by the defendant. This included testimony that he had been raised without proper guidance, that his mother had been an alcoholic and possibly a prostitute, that he had been subject to physical punishment as a child, and that he was emotionally disturbed. 455 U.S. at 107.

[35] In *Woodson*, for example, the plurality opinion repeatedly cites to the plurality opinion in *Trop v. Dulles*. 428 U.S. at 288, 301, 304.

[36] In *Stanislaus Roberts*, the plurality opinion elaborated on this rationale by adverting to "our society's rejection of the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'" 428 U.S. at 333, quoting *Williams v. New York*, 337 U.S. 241, 247 (1949).

agree that 'the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process.'" 438 U.S. at 603, quoting *Furman v. Georgia*, 408 U.S. at 402 (Burger, C.J., dissenting). The opinion recognizes that the prevalent "public policy" of sentencing discretion is the product of legislative choice rather than constitutional mandate. However, the opinion concludes that the same "considerations that account for the wide acceptance of individualization of sentences in noncapital cases" justify requiring it as a matter of constitutional law in capital cases. 438 U.S. at 605.[37]

The opinion of the Court in later cases such as *Roberts (Harry)*, *Sumner v. Shuman*, and *Eddings* simply adopt without much elaboration the rationale of the plurality opinions in *Woodson* and *Lockett*.

We have already explained why the progressive enlightenment theory of *Weems* and *Trop* is an illegitimate basis for interpreting the Punishments Clause. It is important to recognize that in *Woodson*, *Lockett* and their progeny the Court went well beyond the holding of *Weems* regarding proportional punishment. Today, we are told that enlightened social theory requires punishment to be proportional, not to the *crime*, but to the *criminal*.

Moreover, even if the meaning of the Eighth Amendment reflects changes in social theory, then the rationale of *Woodson* and *Lockett* is simply out of date. The evolution of sentencing theory and practice now strongly supports mandatory sentencing as the more enlightened pol-

[37] The *Lockett* opinion bases this distinction in part on the *Woodson* epigram that "the penalty of death is qualitatively different." 428 U.S. at 305. It also argues that: "A variety of flexible techniques—probation, parole, work furloughs, to name a few—and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases." *Id.* As we note below with regard to discretionary sentencing, however, these techniques of post-sentence flexibility have come under serious criticism in recent years. *See* note 38 *infra*.

icy.[38] Thus, even if one applies this evolutionary approach to the Eighth Amendment, it provides no support for invalidating a mandatory death penalty for first-degree murder.

E. Finally, in *Booth* the Court Erred in Holding that the Clause Mandates a Theory of Punishment Inconsistent With the Consideration of Victim Impact Evidence.

In *Booth v. Maryland*, the Court applied its Punishments Clause jurisprudence to the use of a victim impact statement in the sentencing phase of a capital trial. The Court held it was unconstitutional for the jury to consider information about the character of the victim, the impact of the crime on the victim's family or their sentiments about the crime. 107 S. Ct. at 2532-36.

We will argue in part II *infra* that *Booth* is incorrect for reasons unrelated to our criticisms of the Court's recent jurisprudence of the Punishments Clause. First, however, we examine how *Booth* is the product of that flawed jurisprudence.

Booth, of course, continues the Court's effort to build a set of procedural requirements for the death penalty under the Punishments Clause that is entirely separate from any analysis under the Due Process Clause as in *McGautha*. Indeed, the Court in *Booth* carefully states that its opinion carries no implication concerning the use

[38] *See* S. Kadish, S. Schulhofer & M. Paulsen, *Criminal Law and its Processes* 1106-26 (4th ed. 1983) (materials on the determinate sentence reform movement); K. Starr, "The Impetus for Sentencing Reform in the Criminal Justice System," in *Crime and Punishment in Modern America* 299-312 (P. McGuigan & J. Pascale, eds., 1986); Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv. L. Rev. 1938, 1940-44 (1988); Lowe, *Modern Sentencing Reform: A Preliminary Analysis of the Proposed Federal Sentencing Guidelines*, 25 Am. Crim. L. Rev. 1 (1987). Congress adopted the policy of mandatory sentencing guidelines for all federal courts in the Sentencing Reform Act, part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

of victim impact evidence in non-capital cases. *Id.* at 2536 n.12.[39] As stated above, we believe the Court should return to considering procedural issues of this nature under the framework of *McGautha*.

Booth is also based upon the view that evolving standards of decency require capital punishment to reflect an "*individualized* determination" based upon each defendant's unique situation. *Id.* at 2532 (quoting *Zant v. Stephens*, 462 U.S. at 879). This, of course, reflects the once-fashionable theory that rejected mandatory sentencing for a discretionary and individualized approach. We also believe this rationale is unwarranted. *See* part I.D. *supra*.

At bottom, however, *Booth* reflects a view that evolving standards of decency require a utilitarian approach to punishment. This is not expressly stated in the opinion, but becomes clear upon examining its antecedents and effect.

A basic value of victim impact evidence is to satisfy the need of the victim (including in a murder case the victim's family) to seek retribution for a grievous loss. A sentencing procedure that permits victims to have direct or indirect input into the sentencing process obviously satisfies this purpose more effectively than one in which their voice is excluded. *Booth* treats such input from victims as irrelevant to any proper sentencing considerations. 107 S. Ct. at 2534-36.

Why is the victim's desire for retribution irrelevant? Some members of the Court have indicated that evolving

[39] It has been argued that the rationale of *Booth* should be extended to non-capital cases. Note, *Booth v. Maryland—Death Knell for the Victim Impact Statement?* 47 Md. L. Rev. 701, 722-31 (1988). In view of the Court's rejection of a distinction between capital punishment and prison sentences for purposes of the Punishments Clause in *Solem v. Helm*, 463 U.S. 277 (1983), this argument is not too far-fetched. However, we are not aware of any case thus far in which a lower court has applied *Booth* to non-capital sentencing.

standards of decency have brought us to a point where retribution is no longer a proper goal of criminal punishment. Justice Marshall's concurring opinion in *Furman* states in part:

> Our jurisprudence has always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment. Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.
>
> Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.

408 U.S. at 343 (citations and footnote omitted). *See also id.* at 387 (Brennan, J., concurring).

Here, again, one wonders what constitutional source justifies the rejection of a retributionist theory of punishment for a utilitarian approach. In fact, both theories were known at the time the Eighth Amendment was adopted.[40] Since then, the relative popularity of the theories has varied from time to time.[41] In his lecture on the criminal law first published in 1881, Oliver Wendell Holmes observed as follows:

> It certainly may be argued, with some force, that it has never ceased to be one object of punishment to satisfy the desire for vengeance . . . .
>
> The statement may be made stronger still, and it may be said, not only that the law does, but that it ought to, make the gratification of revenge an object. This is the opinion, at any rate, of two authorities so great, and so opposed in their other views, as

[40] *See* Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838, 845-53 (1972).

[41] *See* W. Berns, *For Capital Punishment* 41-82, 128-52 (1979) (discussing the rise and fall of rehabilitative, deterrent and retributionist theories of punishment since the Eighteenth Century).

> Bishop Butler and Jeremy Bentham. Sir James Stephen says, 'The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite.' [42]

Holmes went on to indicate that the criminal justice system could appropriately reflect in various ways all of the theories of punishment. Our point in presenting this discussion is that we have no reason to assume that the Framers meant to incorporate one theory rather than the other into the Punishments Clause.

However, if the Constitution embodies the latest trend in evolving social theory, then the Court's insistence upon a utilitarian approach to punishment is out of date. In recent years, there has been a great change in penological thought. The utilitarian theories have been at least partially discredited, and the retributionist theory is now quite popular. One commentator has summarized this trend as follows:

> In the modern area, judicial sentencing philosophy had changed radically; rather than requiring that the punishment fit the crime, judges adopted the view that the punishment should fit the offender. During the 1950's, the predominant judicial philosophy of punishment, as well as the prevailing view of penologists favored the concepts of deterrence and rehabilitation over the concepts of retribution and incapacitation. More recently, however, the emphasis has shifted again; both judges and penologists have expressed considerable skepticism about the value of rehabilitation. Support is growing in the courts and Congress for a crime control model of punishment based primarily upon retribution and incapacitation.[43]

[42] O.W. Holmes, *The Common Law* 40, 41 (1923 ed.).

[43] Ogletree, *supra* note 38, at 1940-41 (footnotes omitted). *See also* W. LaFave & A. Scott, *Criminal Law* 26-29 (2d ed. 1986); Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 Wis. L. Rev. 781 (1976).

A court whose jurisprudence of the Punishments Clause requires it to reflect "evolving standards of decency" cannot today claim that considerations of retribution must be excluded from the capital sentencing process.

II. ALTERNATIVELY, *BOOTH* SHOULD BE OVERRULED BECAUSE IT IS ERRONEOUS EVEN IN THE CONTEXT OF THE COURT'S OTHER DECISIONS UNDER THE PUNISHMENTS CLAUSE.

A. There Is No General Constitutional Impediment to According a Victim Standing to Participate in the Criminal Process, Including Sentencing.

It is a legal fiction of comparatively recent origin that only the state has an interest in the prosecution of crimes. In England prior to the Nineteenth Century, criminal prosecution was primarily the responsibility of the victim. Public prosecutors were actually more common in the colonies at the time of the American Revolution. Still, private prosecution was accepted in the United States at the time the Eighth Amendment was adopted and for some years thereafter.[44] In light of this history, it would be hard to say that the Framers thought that victim participation in criminal prosecution raised a constitutional doubt. Nor can it be said that the move to public prosecution reflected a desire to eliminate any role for the victim.[45]

Even today, however, private prosecution of crimes is permitted in a number of states. Although the propriety of allowing a victim to control the prosecution of a crime has been called into question, the point is a debatable

[44] See Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 Pepperdine L. Rev. 117, 125-32 (1984); Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J.L. & Pub. Pol'y 357, 359-72 (1986); Benson, *The Last Victim and Other Failures of the Public Law Experiment*, 9 Harv. J.L. & Pub. Pol'y 399, 400-12 (1986).

[45] Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, 47 Law & Contemp. Probs. 225, 245 (1984).

one.[46] The existence of a close debate on victim control of prosecution suggests that more limited victim participation in the nature of an impact statement should not be constitutionally questionable.[47]

In fact, victim preferences play an important if informal role in many aspects of the criminal justice system.[48] At the very outset, victims can decide whether to report a crime, and in fact most crimes are not reported. The filing of a formal "complaint" is often required before police will make an arrest for certain crimes. Victims also influence the decision to prosecute and whether to plea bargain.[49] It has rarely been suggested that it is improper for victim preferences to influence such matters, and any requirement to the contrary would certainly require substantial modifications in our criminal justice system.

[46] *Compare* Note, *The Outmoded Concept of Private Prosecution*, 25 Am. U.L. Rev. 754 (1976), *with* Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 Yale L.J. 209 (1955). *See also* Gittler, *supra* note 44, at 150-63; Cardenas, *supra* note 44, at 372-84.

[47] Decisions denying interested parties a role in criminal proceedings reflect descriptive, rather than normative, conclusions. For example, private parties, including victims, have been denied standing to compel enforcement of criminal statutes, but the lack of standing is generally related to the absence of any statute conferring a right to sue. Green, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 Yale L.J. 488 (1988). *See also Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (although standing to challenge nonprosecution was denied for lack of actual or threatened injury, "Congress may enact statutes creating legal rights, the invasion of which creates standing. . . .") *But see Young v. U.S. ex rel Vuitton et Fils*, 107 S. Ct. 2124, 2141 (1987) (Blackmun, J., concurring).

[48] Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 Vand. L. Rev. 931 (1975).

[49] "The prevailing prosecutorial view is that the victim who most vigorously seeks full enforcement of the criminal law is the survivor of the deceased in a homicide case. Local prosecuting officials concede that 'great weight' is given to the victim's desires in serious felony cases, especially homicides." *Id.* at 948.

Recent years have seen a dramatic trend toward greater formal involvement of victims in the criminal process. Nearly all states and the federal government have adopted victim rights legislation that includes the consideration of victim impact at sentencing.[50] This legislation takes various forms, including the presentation of a formal victim impact statement at sentencing or according the victim a right of "allocution" comparable to the defendant's right to speak before being sentenced.[51] Under *Booth*, all of this legislation is invalid in capital cases.

Although the states and federal government have made progress in recognizing victims rights, most European countries accord victims greater rights of participation in the criminal process.[52] This aspect of comparative law indicates that victim participation in the criminal process is not an outdated vestige of primitive legal cultures.

B. Victim Participation Serves Important Social Purposes.

We have previously presented our view that the Constitution does not require all criminal punishments to be justified on utilitarian grounds. *See* part I.E. *supra*. However, from a purely utilitarian perspective, victim participation in the criminal process serves a number of important purposes. This analysis supports our view that *Booth* was wrong in excluding victim impact evidence in capital cases.

1. *Victim Involvement in the System Discourages Vigilantism.*

Justice Stewart's concurring opinion in *Furman* contains the following observation: "When people begin to

[50] A listing of these statutes is included as an appendix to this brief.

[51] See Gittler, *supra* note 44, at 172-76.

[52] See Hall, *supra* note 48, at 978-80; Cardenas, *supra*, note 44, at 384-87; Gittler, *supra* note 44, at 178-81.

believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law." 408 U.S. at 308. These concerns are not fanciful.

The victim's rights movement has gained strength in recent years, indicating widespread unrest among victims with the current criminal justice process.[53] Citizen's groups, such as the Guardian Angels in New York or the Nation of Islam in Washington, D.C., have chosen to provide their own "police force" due to growing skepticism of the State's ability to provide protection.[54] The public often allies itself with citizens who "take the law into their own hands" in response to the inability of the criminal justice system to recognize society's rights and needs.[55] All of these facts indicate that society is perhaps reaching the point at which the concept of justice held by the individual, and by the general public, is no longer satisfied by the law.

2. *A Right of Victim Participation Encourages Cooperation with Police and Prosecutors.*

When victims of crime perceive that the criminal justice system is not vindicating their interests, support for

[53] Both on the national and local levels, orgaizations have sprung up across the country to address issues of concern to crime victims and to promote the rights of victims. *See* Carrington and Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 Pepperdine L. Rev. 1 (1984); National Organization for Victims' Assistance, Victims' Rights and Service: A Legislative Directory (1987).

[54] Some of these groups have, at times, resorted to violent acts in an effort to subdue alleged wrongdoers. Earlier this year members of the Nation of Islam, who had assumed a patrol of a drug-ridden apartment complex in Washington, D.C., were reported to have severely beaten a man observed carrying a shotgun. Wash. Post, April 19, 1988, at A1.

[55] The case of Bernard Goetz is instructive. Goetz initially received much public suport for his actions. *See* N.Y. Times, Jan. 27, 1985, Sec. 4, at 20, col. 1 (discussing reasons for public support of Goetz).

the criminal justice system, which is crucial to the apprehension and conviction of criminals, declines. "Indeed, the conclusion has become nearly inescapable: a criminal justice system that ignores the interests of or ill treats the victim runs the risk of alienating the person upon whom its success as an institution depends." [56]

Crime victims are the major initiators of the criminal process. Approximately eighty percent of crimes are made known to the police through reports of citizens, usually victims.[57] Yet, various statistics indicate that many crimes go unreported.[58] Among the reasons why victims opt not to report crimes is the fear that the system is powerless to help them and might further victimize them.[59] Similarly, crime victims often choose not to cooperate with prosecution of the offender, leading to dismissal of many cases.[60] Non-cooperation is caused by both the administrative problem of lack of information, and by the systemic flaw of failing to take victims' views and interests into account.[61]

[56] Hudson, *The Crime Victim and The Criminal Justice System: Time for a Change*, 11 Pepperdine L. Rev. 23, 28 (1984).

[57] Gittler, *supra* note 44, at 147.

[58] Judge Mikva has noted that for every ten crimes committed, an estimated three or four are reported. This figure indicates a "pervading cynicism about the system's capacity to insure justice." Mikva, *Victimless Justice*, 71 J. Crim. L. & Criminology 189, 190 (1981). The Bureau of Justice Statistics, *U.S. Dep't of Justice Report to the Nation on Crime and Justice* (Oct. 1983) suggests that less than 50% of all violent crimes are ever reported.

[59] Kidd & Cajet, *Why Victims Fail to Report? The Psychology of Criminal Victimization*, 40 J. Soc. Issues 34-50 (1984), *cited in* Kilpatrick & Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne L. Rev. 7, 21 (1987).

[60] Gittler, *supra* note 44, at 148. *See also* Hudson, *supra* note 56, at 30.

[61] *See* Kelly *Victims' Perceptions of Criminal Justice*, 11 Pepperdine L. Rev. 15 (1984).

Since victims of crime have already suffered, physically and psychologically, it is not surprising that they choose to avoid involvement in the criminal process. Studies addressing victim involvement in the criminal process suggest that there is a high correlation between victims' satisfaction and their perceptions that they influenced the outcome or that the sentencing authority was sensitive to victim issues.[62] These studies confirm that a greater role for victims in the sentencing process may positively impact on the reporting and investigation of crime.

3. *Participation in the Criminal Justice System Helps to Remedy the Traumatic Effects of Crime on the Victim.*

Victimization carries with it profound psychological consequences, both immediate and long term, and it is often this psychological injury that has the greatest impact on the victim.[63] In addition to crime-related stress caused by feelings of inequity, loss of security, perceived greater vulnerability, and perception of being deviant, crime victims are psychologically affected by the lack of any role in the criminal process. The victim quickly learns that the system's resources "are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands." [64] This realization, combined with the long duration of the capital criminal process, results in a feeling of loss of identity and additional emotional and psychological stress for the victim.[65] Permitting crime victims to participate in the proceedings can eliminate or reduce the potential for

[62] Kilpatrick & Otto, *supra* note 59, at 23-24 (citing J. Herndon & B. Forst, *The Criminal Justice Response to Victim Harm* (1984)).

[63] Task Force on the Victims of Crime and Violence, *Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 Am. Psych. 107 (1985).

[64] *Id.* at 109.

[65] *Id.*; Gibbons, *Victim Again: Survivors Suffer Through Capital Appeals*, 74 A.B.A. J. 64 (Sept. 1988).

further psychological harm by reducing their perception of inequity or helplessness."[66] In particular, participation at the sentencing phase can be a cathartic experience for the victim, which helps bring an end to the psychological suffering that follows victimization.

C. The Extent of Harm to a Victim, Even if Unrelated to the Defendant's State of Mind, May Be Properly Considered As a Factor in Determining Whether to Impose Capital Punishment.

Our criminal justice system is rife with situations where the extent of harm caused the victim is relevant to the degree of culpability. The contrast in treatment between a reckless driver, who speeds through a red traffic light and continues on his way, and a similar driver who unintentionally kills a pedestrian, has previously been noted.[67] In the latter situation, the fact that the victim's presence was not anticipated and the harm not intended does not eliminate the defendant's culpability for homicide. Similarly, an offender may be punished for assaulting a federal officer, despite lack of proof that he was aware of the victim's status.[68]

Some have argued that the law should not take into account distinctions of this nature, which are unrelated to the individual defendant's personal moral culpability.[69] However, this theory has never been reflected in American criminal law in other contexts and has been persuasively criticized.[70] There is no reason to require capital sentencing proceedings to adhere to a legal theory that is largely unknown to our general criminal jurisprudence.

[66] Kilpatrick and Otto, *supra* note 59, at 19.

[67] *Booth*, 107 S. Ct. at 2540 (White, J. dissenting).

[68] *United States v. Feola*, 420 U.S. 671 (1975).

[69] *See* Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. Pa. L. Rev. 1497 (1974) (arguing, *inter alia*, that the penalty for drunk driving should be the same regardless of whether someone is killed).

[70] Holmes, *supra* note 42, at 41-51. Interestingly, Holmes' discussion points out that utilitarian theories are often advanced for imposing punishment without regard to individual moral blameworthiness.

D. Victim Impact Evidence Counterbalances the Defendant's Trial Strategy of Presenting Mitigating Evidence.

We have already described the decisions of this Court that give a capital defendant the right to present an unlimited range of evidence designed to appeal to the sympathy of the jury. *See* part I.D. *supra*. The impact of these decisions has been described as follows:

> In practical terms, . . . the death sentence will be imposed upon "the diminishing few who do not have this [mitigating] evidence (or as much of it) to offer." Penalties in capital cases ultimately will turn on mitigating evidence and on the advocate's ability to marshall and present that evidence. As a matter of law and practice, the opportunity to present almost any arguably mitigating evidence crucially distinguishes death penalty trials from all other criminal trials.[71]

Mitigation evidence has thus become a key part of the defendant's trial strategy. The elements of that strategy have even been articulated for the benefit of defense counsel, the main point being, "try to convey defendant's humanness to the sentencer."[72] An example of the effectiveness of the strategy is provided in the following case:

> Bernardino Sierra was mean, big and ugly, and he had done evil and inhuman things. In eight hours, he had committed twelve robberies, two maimings, and three killings. He had terrorized and tortured people. While one of his victims was lying on the ground with his face in a pile of broken glass, Sierra kicked him in the back of the head to drive glass into his eyes. Another victim also lay face down.

[71] Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 315 (1983) (citations omitted).

[72] *Id.* at 362.

Sierra raked his shotgun up the spine of this one, then fired into the wooden floor beside his head, exploding wood fragments into his head and neck. The experts said it was the "most likely case for capital punishment perhaps in the history of Harris County."

[At sentencing, Sierra presented evidence that] when he was a little boy, his stepfather would come home drunk at night and beat him with a wire whip, catching him while he was asleep. His stepfather would lock him out of the house at night sometimes, and he would crawl under it to make his miserable bed and try to sleep. Often he was hungry and had no food. He ate out of garbage cans. He brought the best food he found there home for his mother and little sister.

His mother told this to the jury. Then his son, a beautiful little boy, got on the stand and told the jury "That's my father." And the lawyer asked him, "What's the jury going to decide?" "Whether he lives or whether he dies," said the little boy.

The jury spared Sierra's life.[73]

Since capital defendants are given such extreme latitude in presenting mitigation evidence, it seems only fair to allow some presentation of victim impact evidence at the sentencing phase.[74] It may well be that a court should use its power under the rules of evidence to exclude particular items of victim impact evidence that are uniquely prejudicial.[75] However, the existence of a *per se* rule of

[73] *Id.* at 300-01 (footnote omitted).

[74] *See* American Bar Association, Guidelines for Fair Treatment of Victims and Witnesses in the Criminal Justice System 18 (1983).

[75] The fact that the prosecutor in this case referred to the victim's religious beliefs does not seem uniquely prejudicial. Defense counsel also frequently appeal to the religious sympathies of jurors. In one case where a jury decided not to impose the death penalty, evidence was introduced that the defendant had become a born-again Christian and was running a ministry from his prison cell. Weinberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305, 324-25 n.80 (describing the retrial after remand in *Lamb v. State*, 243 S.E.2d 59 (Ga. 1978)). Another tactic is for defense counsel to use religious arguments to "try the death penalty itself." Goodpaster, *supra* note 71, at 336, *citing Davis v. State*, 241 Ga. 376, 387, 247 S.E.2d 45, 52 (college religion professor permitted to testify in opposition to death penalty), *cert. denied*, 439 U.S. 947 (1978). In fact, this tactic was attempted in the instant case. At the end of his closing argument, defense counsel told the jury, "You are answerable only to God, the God of us all. Blessed are the merciful." Tr. 1214, quoting Matthew 5:7a.

exclusion gives the defendant an unwarranted advantage in seeking to appeal to the jury's sympathy.

Part of the concern about admitting victim impact evidence may derive from the belief that each human life must be treated as having equal value. The Court in *Booth* thought it wrong to impose more severe punishment for the death of a person who is wealthier, has more articulate relatives or whose loss evokes a greater sense of grief. 107 S. Ct. at 2534 n.8.

One answer, of course, is that the ideal of equality is never perfectly implemented in the criminal process. Defendants who are wealthier can hire more talented lawyers. More attractive defendants receive more lenient sentences. The law punishes the murder of a police officer or President more seriously than the murder of an ordinary citizen. A requirement of exact equality in the administration of capital punishment would be so unrealistic and unattainable as to deny the state the ability to exact such punishment at all. *McCleskey v. Kemp*, 107 S. Ct. 1756, 1781 (1987).

We can also question, however, the assumption that considering victim impact evidence will contribute to invidious discrimination on the basis of victim status. The facts of the instant case illustrate that a jury can be persuaded that justice requires the death penalty when the victim is not wealthy or socially prominent. Rather than emphasizing differences, victim impact evidence conveys our common humanity with those who suffer from crime and keeps us from thinking of them as faceless

abstractions. Richard Haynes, who was so brutally murdered by the defendant in this case, was a real and unique person. It is only just that the jury was permitted to understand this truth.

CONCLUSION

For the foregoing reasons, the Supreme Court of South Carolina should be reversed, and this Court's decision in *Booth v. Maryland* should be overruled.

Respectfully submitted,

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APPENDIX

APPENDIX

VICTIM IMPACT LEGISLATION

Federal

Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1242.

State

Alaska	—Alaska Stat. § 12.55.022 (Supp. 1988)
Arizona	—Ariz. Rev. Stat. Ann. §§ 12-253(4), 13-702(D)(9) (Supp. 1987)
California	—Cal. Penal Code §§ 1191.1 & 1203(h) (Supp. 1988)
Colorado	—Col. Rev. Stat. § 16-11-102 (1986)
Connecticut	—Conn. Gen. Stat. Ann. § 54-91 (1985)
Delaware	—Del. Code Ann. Title 11 §§ 4331(d) & (e) (1987)
Florida	—Fla. Stat. Ann. § 921.143 (1985)
Georgia	—O.C.G.A. §§ 17-10-1.1, 1.2 (1985)
Idaho	—Id. Code § 19-5306 (1985)
Illinois	—Il. Stat. Ann. §§ 38-1406, 1005-4-1(6) (Supp. 1988)
Indiana	—Ind. Code Ann. §§ 35-38-1-8 & 9 (1985 & Supp. 1988)
Iowa	—Iowa Code Ann. § 901.3 (Supp. 1988)
Kansas	—Kan. Stat. Ann. § 21-4604(2) (Supp. 1987)
Kentucky	—Ky. Rev. Stat. §§ 421.500(5)(b), 421.520 (1985)
Louisiana	—La. Rev. Stat. § 46:1844(9) (Supp. 1986)
Maine	—Me. Rev. Stat. Ann. Title 17-A § 1257 (Supp. 1988)

Maryland	—Md. Code Ann. art. 41 § 4-609 (1987)
Massachusetts	—Mass. Ann. Laws ch. 279 § 4B (Supp. 1988)
Michigan	—Mich. Stat. Ann. § 28.1287 (763) (764) (765)
Minnesota	—Minn. Stat. Ann. §§ 609.115, 611A.037 (Supp. 1988)
Mississippi	—Ms. Code §§ 99-19-151 to 161 (Supp. 1988)
Missouri	—Mo. Rev. Stat. § 595.203 (1986)
Montana	—Mont. Code Ann. § 46-18-112 (1987)
Nebraska	—Neb. Rev. Stat. § 29-2261 (1985)
Nevada	—Nev. Rev. Stat. § 176.145 (1987)
New Jersey	—N.J. Stat. Ann. § 2C:44-6.b (Supp. 1988)
New Mexico	—N.M. Stat. Ann. § 31-24-5 (1987)
New York	—N.Y. Crim. Proc. Law § 390.30(3b) (Supp. 1988)
North Carolina	—N.C. Gen. Stat. §§ 15A-825, 15A-1340.4 (1987)
North Dakota	—N.D. Cent. Code ch. 12.1-34-02.14 (Supp. 1987)
Ohio	—Ohio Rev. Code Ann. § 2947.051 (Supp. 1985)
Oklahoma	—Okla. Stat. Ann. Title 22 § 982 (1986)
Oregon	—Or. Rev. Stat. § 144.790(2), (4) (1983)
Pennsylvania	—71 Pa. Stat. § 180-9.3 (Supp. 1987)
Rhode Island	—R.I. Gen. Laws §§ 12-28-4 to 4.3 (Supp. 1986)
South Carolina	—S.C. Code Ann. § 16-3-1550 (1985)
Tennessee	—Tenn. Code Ann. §§ 40-35-207(8), 40-35-209 (Supp. 1987)

Texas	—Tx. Stat. Ann. §§ 56.02, 56.03 (Supp. 1988)
Vermont	—Vt. Stat. Ann. Title 13 § 7006 (Supp. 1988)
Virginia	—Va. Code Ann. § 19.2-299.1 (Supp. 1988)
Washington	—Wash. Rev. Code § 7.69.030 (Supp. 1989)
West Virginia	—W.Va. Code §§ 61-11A-2 & 3 (1984)
Wisconsin	—Wis. Stat. Ann. § 950.04(2m) (Supp. 1988)
Wyoming	—Wy. Stat. §§ 7-13-303(a)(iv), 7-13-402(e)(v) (1987)

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No. 88-305

In The

Supreme Court of the United States

October Term, 1988

SOUTH CAROLINA,

Petitioner,

v.

GATHERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

MOTION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE CENTER FOR CIVIL RIGHTS AND THE STOP! THE MADNESS FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE FOR THE CENTER FOR CIVIL RIGHTS AND THE STOP! THE MADNESS FOUNDATION IN SUPPORT OF PETITIONER

Applicants Landmark Legal Foundation Center for Civil Rights and the Stop! the Madness Foundation request permission to file an *amicus curiae* brief in support of Petitioner, based on the following:

1. Landmark Legal Foundation Center for Civil Rights is a public interest law center that litigates in support of fundamental individual rights, including freedom from crime. Stop! the Madness Foundation is an

educational organization that promotes the rights of crime victims and helps raise public consciousness against crime.

2. Our brief will supplement the arguments of the parties by focusing on the rights of crime victims, who are not parties to this litigation but whose interests are directly impacted by the questions of law at issue in this case.

For the foregoing reasons, applicants request permission for leave to file the attached *amicus curiae* brief.

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Dated: December 2, 1988

Movants requested permission to file from petitioner and respondent, which consent was granted by petitioner but withheld by respondent.

No. 88-305

In The

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October Term, 1988

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v.

GATHERS,

Respondent.

ON WRIT OF CERTIORARI TO
THE SOUTH CAROLINA SUPREME COURT

BRIEF AMICUS CURIAE FOR THE CENTER FOR CIVIL RIGHTS AND THE STOP! THE MADNESS FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICI

The Landmark Legal Foundation Center for Civil Rights is a public interest law center dedicated to promoting the core values of civil rights: equality under law and fundamental individual rights. A major component of this mission is the freedom from crime, which is the most fundamental of civil rights.

The Stop! the Madness Foundation is a nonprofit charitable organization engaged in a variety of education

efforts related to the eradication of crime and promotion of the rights of crime victims.

SUMMARY OF ARGUMENT

In *Booth v. Maryland*, ___ U.S. ___, 107 S. Ct. 2539 (1987), this Court invalidated the use of Victim Impact Statements in capital sentence hearings. This case presents an opportunity to revisit that decision.

Booth was wrongly decided for several reasons. First, it fails to take into account the civil rights of crime victims, which Victim Impact Statements serve to vindicate. Second, *Booth* contravenes the American legal tradition and public policy reflected in the statutes of a majority of states and the federal government, which provide for victim participation in sentencing decisions. Finally, *Booth* creates unnecessary conflicts in sentencing rules and unduly restricts the discretion of trial courts. The concerns raised by the majority can be ameliorated through ordinary procedural precautions. Given the vital interests at stake, the Court should correct its error in *Booth* and sustain the use of Victim Impact Statements, with appropriate procedural safeguards, in capital sentencing deliberations.

ARGUMENT

I. VICTIM IMPACT STATEMENTS ARE AN EXPRESSION OF THE MOST FUNDAMENTAL OF CIVIL RIGHTS

Booth v. Maryland was wrongly decided primarily because it focused solely on the rights of criminals and

overlooked completely the civil rights of crime victims. The Constitution does not compel the courts to protect one set of rights to the exclusion of the other.

A "Victim Impact Statement" serves the important purpose of ensuring that the civil rights of crime victims are factored into the sentencing process. It reflects the fact that criminal prosecutions implicate the interests not only of criminal defendants and of society, but also of individual victims, and it provides a mechanism by which those interests may be taken into account and ultimately vindicated.

In a nation grounded in natural law, a system of justice exists to give protection to the fundamental rights of life, liberty, and the pursuit of happiness, rights that cannot adequately be protected in a state of nature. The right to life, of course, is the essential prerequisite to the other fundamental rights of man; and it is the protection of the individual's personal security that is the state's primary purpose. *See generally*, J. Locke, *Second Treatise of Government* (1698).

Accordingly, freedom from crime has traditionally comprised a major focus of the quest for civil rights in America. In 1948, the United States Committee on Civil Rights identified four fundamental civil rights for which protections were inadequate: the right to safety and security, to citizenship and its privileges, to freedom of conscience and expression, and to equality of opportunity. *See* Committee on Civil Rights, *To Secure These Rights* (1948). Forty years later, we have made enormous strides in protecting three of these four basic rights of Americans

– but not freedom from crime. And a vastly disproportionate burden of that failure falls on the shoulders of the least fortunate members of society, especially minorities and the poor. *See* C. Bolick, *Changing Course: Civil Rights at the Crossroads* 116-118 (1988).

The Victim Impact Statement gives voice to these rights. In this case, it does so in the context of the most heinous possible violation of civil rights: the taking of a human life. To deprive the victim and his survivors a role in the sentencing process in such cases is thereby to ignore the most fundamental of civil rights.

This Court's decision here should thus be informed not only by the constitutional protections accorded to criminals and criminal defendants, but also by the spirit of individual liberty in which the Constitution was written – and at whose core lies the right to personal security.

II. THE USE OF VICTIM IMPACT STATEMENTS IN CAPITAL SENTENCING IS CONSTITUTIONAL

A. Statements of victim impact are proper factors to be considered when determining a "defendant's responsibility and moral guilt."

The *Booth* majority held that in determining the validity of sentencing procedures, the challenged evidence "must be scrutinized to ensure that the evidence has some bearing on the defendant's 'personal responsibility and moral guilt,' " *Booth v. Maryland*, ___ U.S. ___, 107 S. Ct. at 2533 (1987) (citing *Enmund v. Florida*, 458 U.S. 782, 801 (1982)). The majority went on to hold that Victim Impact Statements do not fall within this criterion since "the focus of a VIS . . . is not on the defendant, but on the

character and reputation of the victim and the effect on his family." *Booth*, 107 S. Ct. at 2534.

This view is in conflict with the American legal tradition, which has consistently embraced the view that the impact of crime on victims is indeed relevant to a criminal's culpability. As outlined below, victim impact has served historically as an important consideration in sentencing decisions. Public policy considerations reinforce the importance of victim participation in sentencing decisions, and these policy considerations have been ratified by a vast majority of states, which have enacted laws providing for the use of Victim Impact Statements in sentencing decisions. We urge this Court not to lightly set aside this vitally important protection of victims' rights.

1. Victim participation in the criminal justice process is deeply embedded in our legal tradition. The precolonial English system of criminal prosecution was a private process, with the victim or victim's family directly bringing a case against the criminal offender. The victim was required to pay the costs of prosecuting the case, which included payments of trial costs to the justice of the peace. *See* E. Zeigenhagen, *Victims, Crime, and Social Control* 63-64 (1977). This system of private prosecution produced inequities that were recognized during the late 18th and early 19th centuries in the United States. As one commentator notes, "Under a system of private prosecution, the prosecution of criminal offenses depends upon the ability and willingness of the victim or other interested individuals to bring prosecution, which the poor and powerless are less able and willing to do. Accordingly, one of the reasons for establishing the office of public prosecutor might have been to obtain redress

for crimes committed against them or their property." Carrington and Nicholson, *The Victim's Movement: An Idea Whose Time Has Come*, 11 PEPPERDINE L. REV. 1, 130(1984)(citing 1 J. Stephen, *A History of the Criminal Law of England* 493-503 (1883)).

As the role of prosecutor gradually evolved from a private to a public function, the close-knit communities during this period produced juries familiar with the circumstances of the particular crime, including the crime's effect on the victims and their families. While the victim did not necessarily play a formal role in sentencing determinations, the fact that information was easily shared within entire communities meant that few sentencing decisions were made without knowledge of the effect of the crime on the victim and the victim's family.

With the emergence of large urban communities, the docket of most criminal courts expanded and criminal justice became more institutionalized, leading to courts that were increasingly detached from the individuals who were directly impacted by the crime at issue. But at the same time, the criminal justice system developed in other ways that provided new protections for victims of crime. A growing number of prosecutors were elected rather than appointed, in part to adequately reflect the views and standards of each local community. The practice of individual sentencing gradually replaced statutory fixed sentencing, allowing punishment to "fit the offender and not merely the crime." *Williams v. New York*, 337 U.S. 241, 247 (1948); *see also* Posner, *Victim Impact Statements and Restitution: Making the Punishment Fit the Victim*, 50 BROOKLYN L. REV. 301, 304 (1984).

Thus, we see in the roots of American jurisprudence the foundation for victim involvement in criminal proceedings. Early reforms occurred not to exclude the victim, but rather to insure that defendants were afforded protection by the criminal justice system while simultaneously recognizing the interests of victims.

In recent decades, however, the growing depersonalization of the criminal justice system has eroded this balance between criminal procedural rights and the interests of crime victims. As a result, most states and the federal government have created new mechanisms to insure victim participation in the prosecution process. In particular, a vast majority of states have enacted "Victim's Bill of Rights" laws providing opportunities for victim participation in the sentencing process. The *Booth* decision cuts against these efforts to safeguard the rights of crime victims – efforts that reflect a concern for victims that is a cornerstone of American criminal jurisprudence.

2. The Booth majority also concluded that the contents of Victim Impact Statements "may be wholly unrelated to the blameworthiness of a particular defendant." *Booth*, 107 S.Ct. at 2534. The majority does not explain in detail the reasoning behind this view, nor does it explain why victim-related factors may be relevant to other types of sentencing decisions but not to capital sentencing decisions. And although the majority would require "individualized determination[s]" in sentencing based on the "'character of the individual and the circumstances of the crime,'" *Booth*, 107 S. Ct. at 2532 (citing *Zant v. Stephens*, 462 U.S. 862, 879 (1983)), the majority does explain why the effects of the murderer's act do not fall within the "circumstances of the crime."

In reality, as Chief Justice Rehnguist observed in *Zant v. Stephens*, *id.* at 900 (Rehnquist, J., concurring), the circumstances of the crime are relevant in two discrete facets of the criminal prosecution: proof of guilt and sentencing. Victim impact is relevant in the second phase, in which the sentencing jury "does not attempt to decide whether particular elements have been proved, but instead makes a unique, individualized judgment regarding the punishment that a particular person deserves." *Id.* at 900 (Rehnquist, J., concurring).

Victim Impact Statements are relevant to this inquiry. As Justice White observes,

> There is nothing aberrant in a juror's inclination to hold a murderer accountable not only for his internal disposition in committing the crime but also for the full extent of the harm he caused; many if not most persons would also agree, for example, that if someone who drove his car recklessly through a stoplight and unintentionally killed a pedestrian merits significantly more punishment than someone who drove his car recklessly through the same stoplight at a time when no pedestrian was there to be hit.

Booth, 107 S.Ct. at 2504 (White, J., dissenting).

Public policy considerations broadly support the proposition that the effect of crime on victims is indeed a valid and essential factor in sentencing determinations, as demonstrated by the adoption by a majority of states of "Victim's Bill of Rights" statutes that mandate the inclusion of victim impact evidence in sentencing proceedings.[1] Congress has also passed a similar statute

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[1] The states include Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana,

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requiring consideration of victim impact in sentencing decisions. *See* 18 U.S.C. 3580. As Justice White noted in his *Booth* dissent, 107 S.Ct. at 2539 (White, J., dissenting), "[D]eterminations of appropriate sentencing considerations are 'peculiarly questions of legislative policy'," – determinations that reflect important public interest considerations that this Court should not lightly set aside.

3. The *Booth* decision also creates a conflicting set of standards to govern evidence pertaining to victims in sentencing proceedings. First, it creates a single context in which a specific type of relevant evidence, admissible in other contexts, may not be used. For instance, victim-related considerations are taken into account in determining what types of conduct constitute capital offenses. "Special circumstances" statutes, for example, call for enhanced sentences where the victim is within a particular class (e.g., police officers, racially or politically motivated crimes, sex offenses). In such cases, this information is presented to the jury or judge to support requests for enhanced sentencing.

Moreover, this Court has upheld the use of information relating to the victim and to the impact of the crime at issue where they might aid the criminal defendant, such as in mitigation of crime. "It is well settled that the Government has the obligation to turn over evidence in

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Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and West Virginia. *See* Sharman, *Victim Impact Statements and the Eighth Amendment*, 11 HARV. J. OF LAW AND PUBLIC POLICY 583, 591 n.42 (1987); Carrington and Nicholson, supra, at 175-173 n.175-176.

its possession that is both favorable to the accused and material to guilt *or punishment.*" *Pennsylvania v. Ritchie*, ___ U.S. ___, 107 S. Ct. 989, 1001 (1987) (emphasis added). The Court has also held that "the Eighth and Fourteenth Amendments require that the sentencer [in a capital case] not be precluded from considering, *as a mitigating factor*, . . . any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *California v. Ramos*, 463 U.S. 992, 1001 (1983) (emphasis added). Yet the *Booth* majority would prohibit the same types of relevant information from being used where it would underscore the gravity or impact of the crime.

This distinction is illogical. As Justice White correctly observes, "the State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in." *Booth*, 107 S. Ct. at 2540 (White, J., dissenting) (citing *Eddings v. Oklahoma*, 455 U.S. 104 (1982)). He explains that "just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Id.* at 2540. Likewise, Justice Scalia assailed this distinction in his *Booth* dissent, *id.* at 2542 (Scalia, J., dissenting):

> To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed, is in effect to proscribe a debate of the appropriateness of the capital penalty with one side muted. If that penalty is constitutional, as we have repeatedly said it is, it seems to me not remotely unconstitutional to permit both the pros and the cons in the particular case to be heard.

Additionally, *Booth* creates a dichotomy between the rights of victims of capital and non-capital offenses. Even though the families of murder victims often suffer the most horrific losses, the holding of *Booth* precludes such families from submitting Victim Impact Statements while allowing victims of even minor crimes to participate in sentencing hearings. Moreover, since the impact of the crime on the victim or victim's family provides the measure of appropriate compensation for restitution purposes, the exclusion of Victim Impact Statements in this context could preclude restitution in the very cases in which the loss is greatest. Overturning *Booth* would remove these conflicts by restoring to juries the ability to consider all relevant evidence in assessing a criminal's moral cupability.

B. Sentencing courts should possess broad discretion in making sentencing determinations.

In making capital sentencing decisions, while "a jury's discretion to impose the death sentence must be 'suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action' " *Booth*, 107 S. Ct. at 2432 (citing *Gregg v. Georgia*, 428 U.S. at 189 (Opinion of Stewart, J.)), trial courts are nonetheless properly accorded broad discretion to include in sentencing decisions such evidence as they deem relevant to the proceedings. As this Court observed in *Williams v. New York*, 337 U.S. at 246,

> [B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the source and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by laws.

Accordingly, the trial judge has broad discretion to consider a wide range of information in arriving at the sentencing decision. *Wasman v. United States*, 468 U.S. 559 (1984); *United States v. Givens*, 767 F.2d 574 (9th Cir.), *cert. denied*, 106 S.Ct. 321 (1985), and in fact may consider information not directly at issue in the criminal charge for which the defendant is being sentenced. *Gregg v. United States, supra; Drayton v. People of State of New York*, 556 F. 2d 644 (2d Cir.), *cert. denied*, 434 U.S. 958 (1977). Indeed, in federal sentencing, the limitations of the Federal Rules of Evidence are not applied to sentencing procedures. FED. R. EVID. 1101(d)(3). *See* 18 U.S.C. 3577. As this Court observed in *Gregg*, 394 U.S. at 492, "There are no formal limitations on [the] contents [of presentence reports], and they may rely on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged."

The prohibition against Victim Impact Statements in the capital sentencing context is thus a departure from the ordinary discretion appropriately conferred upon trial courts in sentencing matters. This Court acknowledged the importance of this broad discretion, noting that to "deprive sentencing judges of this kind of information would undermine modern penological policies that have been cautiously adopted throughout the nation after careful consideration and experimentation." *Williams*, 337

U.S. at 249-250. Rather than creating an ironclad rule that excludes victim-related considerations in the most heinous of crimes, this Court should defer to the judgment of the trial courts, which are in the best position to make individualized determinations that will strike the proper balance among the rights and interests at stake.

C. The constitutionality of Victim Impact Statements should not turn on incorrect presumptions about the content of the statements.

The crux of the *Booth* majority's disapproval of Victim Impact Statements rests on its erroneous assumptions about the content and effects of these statements on sentencing authorities. The majority mistakenly assumes that such statements are inherently inflammatory and that juries or judges will be unable to place Victim Impact Statements in their proper context.

The majority is incorrect to make an across-the-board assumption that Victim Impact Statements will invariably have an inflammatory effect.[2] The only generalization that can be made about such statements is that they place before the trier of fact information about the magnitude of the criminal offense. In fact, the body of scholarship on

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[2] Indeed, it is interesting to ponder what effect *Booth*'s sweeping rule would have on Victim Impact Statements of family members who, for moral or religious grounds, might request that the death sentence *not* be imposed. *See*, e.g., *Regina v. Hardy*, 29 C.C.C. (2d) 84, 33 C.R.N.S. 76 (Que. S.C. 1976) (victim's family urged leniency in sentencing).

jury reactions to victim statements indicates that no clear relationship exists between the use of these statements and harsher sentencing decisions. A preliminary study of jurisdictions with victim impact laws concluded that, with the exception of Ohio, sentences did not increase when victim impact statements were introduced. Hudson, *The Crime Victim and the Criminal Justice System*, 11 Pepperdine L. Rev. 23, 52 (1984). Another study indicates that victims generally concur with the Prosecutors' recommendations for disposition. Heinz and Kerstetter, *Pretrial-Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 Law & Soc'y Rev. 349 (1979); and in many cases, the interest of the victim lies in securing restitution rather than in attempting to affect sentencing. Kelly, *Victims*, 34 Wayne L. Rev. 69, 74 n.26 (1986).

This Court can guard against any misuse of Victim Impact Statements by setting forth procedural guidelines in appropriate factual contexts. Until such guidance is rendered, trial courts will surely apply the same safeguards that govern other types of potentially inflammatory or controversial evidence. Like any other evidence, Victim Impact Statements can be explained and limited through admonitions, jury instructions, and special verdict questionnaires.

The *Booth* majority also raises concerns about the defendant's ability to rebut the Victim Impact Statement, suggesting that "it would be difficult – if not impossible – to provide a fair opportunity to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant." *Booth*, 107 S.Ct. at 2535. However, neither *Booth* nor *Gathers* presents a situation in which the defense was not free to attempt to rebut or mitigate the

issues raised in the context of victim evidence. Again, jury instructions and the supervised use of victim evidence should be sufficient in most cases to ensure that the jury is properly instructed and focused. Certainly no bar exists to the use by the defense of victim-related information to rebut the Victim Impact Statement.

To create an across-the-board prohibition against Victim Impact Statements on the basis of manageable procedural concerns is to literally throw out the baby with the bathwater. The President's Task Force on Victims addressed this concern in its final report to President Reagan in 1982:

> The . . . argument is that participation by victims at sentencing will place improper pressure on judges. The duty of a judge is to dispense justice, and the passing of judgment is a difficult task. The difficulty of the task should not be relieved, however, by discharging it unfairly. Hearing from the defendant and his family and looking into the face of his children while passing sentence is not easy, but no one could responsibly suggest that the defendant be denied his right to be heard or suffer a sentence imposed in secret in order to spare the judge. The victim, no less than the defendant, has a real and personal interest in seeing the imposition of a just penalty. The goal of victim participation is not to pressure justice, but to aid in its attainment. The judge cannot take a balanced view if his information is acquired from only one side.

President's Task Force on Victims of Crime 78 (1982).

In sum, the concerns expressed by the *Booth* majority can be ameliorated through ordinary procedural steps far less sweeping than an outright proscription of Victim

Impact Statements. Such an outcome would be far preferable to the anomalous status quo created by *Booth*, in which all relevant evidence is admissible if it benefits a convicted criminal, but in which the same relevant evidence is excluded if it advances the interests of that criminal's victim – the very person for whose ultimate benefit our system of laws ostensibly exists. The better rule is to ask whether in a particular case the admission of victim-impact evidence serves the ends of justice – a decision appropriately entrusted by our criminal justice system to the judge and jury.

CONCLUSION

For the foregoing reasons, we urge the Court to overrule *Booth* and to reverse the decision of the court below.

Respectfully submitted,

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STATE OF SOUTH CAROLINA,

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SUPREME COURT OF SOUTH CAROLINA

BRIEF *AMICI CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND THE AMERICAN JEWISH CONGRESS

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QUESTIONS PRESENTED

(1) May the sentence imposed on a criminal defendant be based upon an evaluation by a judge or jury of the moral or societal worth of the crime victim?

(2) Did the prosecutor's closing argument in this case encourage the jury to base its decision in favor of capital punishment on such constitutionally impermissible considerations?

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BRIEF AMICI CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. and the AMERICAN JEWISH CONGRESS

INTEREST OF AMICI

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation established to assist black citizens in securing their constitutional rights. In 1967 the Fund undertook to represent indigent death-sentenced prisoners for whom adequate representation could not otherwise be found. The Legal Defense Fund currently represents several indigent condemned prisoners whose cases might be affected by the decision in the instant case.[1]

The American Jewish Congress is an organization of 50,000 members formed in

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[1] Copies of letters from the parties consenting to the filing of this brief have been filed with the Clerk.

1918 to protect the economic, civil, religious and political rights of American Jews. It has a continuing concern that the constitutional safeguards of equal protection of the law, due process and freedom from cruel and unusual punishment are assured all Americans. Although it is an organization which grounds its public policy views in a religious and ethical tradition, it believes that in order to give effect to these constitutional guarantees, a sentence may not be imposed on a criminal defendant based on the evaluation by a judge or jury of the moral or societal worth or religiosity of the crime victim.

SUMMARY OF ARGUMENT

This case, unlike Booth v. Maryland, L.Ed.2d 440 (1987), does not concern whether a sentencing decision may be

based in part on the harm suffered by the family of a murder victim. The question raised by prosecutor's closing argument in this case, and by the decision below, concerns whether a sentencing decision may turn on a jury's opinions about the moral worth or value to society of a victim.

For a judge or jury to impose a greater or lesser penalty in a criminal case, according to their opinions about the moral or societal worth of the victim, would violate one of the core meanings of the equal protection clause. That clause embodies two distinct principles, the familiar anti-discrimination doctrine, and an affirmative obligation on the part of a state to protect with equal vigilance the life, liberty and property of every person within its jurisdiction. While

the anti-discrimination doctrine forbids only certain distinctions, the protection principle prohibits any distinctions in the protection afforded by certain criminal and non-criminal laws. As Senator Poland insisted, "All the people, or all the members of a state or community, are equally entitled to protection."[2]

Although the eighth amendment permits a jury to consider a myriad of circumstances in making a sentencing determination, a jury may not utilize standards likely to reintroduce the arbitrariness condemned in Furman v. Georgia, 408 U.S. 238 (1972), or rely on constitutionally impermissible considerations. California v. Ramos, 463 U.S. 992, 1000 (1983). Permitting jurors

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[2] Cong. Globe, 39th Cong., 1st sess. 2962 (1866).

to base sentencing decisions on their opinions about the moral or societal worth of a victim would inevitably lead to such arbitrariness and improper considerations. Neither South Carolina nor any other state authorizes a sentencing jury to rely on such personal opinions. Many states do single out specific government positions for special protection, but the choice of those positions is always made by the legislature itself, and never left to the whims of particular juries.

The South Carolina Supreme Court, after reviewing the text of the prosecutor's argument at the sentencing hearing, properly concluded that the "remarks conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter." State v.

Gathers, 369 S.E. 2d 140, 144 (S.C. 1988). The dispositive issue is not whether the prosecutor personally intended to violate the eighth or fourteenth amendment, but how a reasonable juror would have understood the prosecutor's statements. Francis v. Franklin, 471 U.S. 307, 315-16 (1985).

ARGUMENT

I. THE SENTENCE IMPOSED ON A CRIMINAL DEFENDANT MAY NOT BE BASED ON A JUROR'S OR JUDGE'S PERSONAL OPINION ABOUT MORAL OR SOCIETAL WORTH OF THE CRIME VICTIM

Two years ago, in a sharply divided opinion, this Court held that the sentence in a capital case could not be based on evidence regarding the harm which the crime might have caused to the family of a murder victim. Booth v. Maryland, 96 L.Ed.2d 440 (1987). This controversial aspect of Booth is not involved in the instant case. At the

penalty phase of the proceeding below, the prosecution neither adduced evidence that there had been injury to the family of the victim, Richard Haynes, nor suggested to the jury that a sentence of death was warranted by any such harm. If this Court wishes to reconsider the holding in Booth that a capital sentence may not be based on such harms to family members, it must do so in another case which actually presents that issue.

The instant case turns on a second, considerably less controversial aspect of the decision in Booth. The majority there also held that a capital sentence could not be based on "the character and reputation of the victim". 96 L.Ed.2d at 440. The court reasoned that there could be no

> justification for permitting such a decision to turn on the perception that the victim was a sterling member of the community rather than

> someone of questionable character. . . . We are troubled by the implication that defendants whose victims were assets to their community were more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions.

96 L.Ed.2d at 450 and n.8. Booth addressed this issue because the Victim Impact Statement in that case contained a substantial and highly laudatory description of the victims. 96 L.Ed.2d at 453, 456.

But the Booth's rejection of such character evidence, unlike its disapproval of evidence regarding family members, involved no rejection of any judgment by the state legislature; the Maryland statute, in a murder case, did not authorize the inclusion in the VIS of any personal information about the victim except his or her identity. 96 L.Ed.2d at 446. In his brief in this Court, the

Maryland Attorney General defended the capital sentence in Booth solely on the basis of the evidence of injury to family members, and carefully avoided any suggestion that state law authorized, or that the federal constitution would permit, the imposition of a death sentence based on the perceived moral or societal worth of the victim. On the contrary, the state in Booth affirmatively insisted that it would indeed be improper to base a capital sentence on the "social status" or "religion" of a victim, and went so far as to urge that any juror inclined to do so ought be removed from the venire.[3] The

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[3] Brief for Respondent, No. 86-5020, p. 36-37. Similarly, in Mills v. Maryland, 100 L.Ed.2d 384 (1988), the state stressed "There was no evidence suggesting that the community at large suffered.... There was no evidence indicating that [the victim] led a life to be valued by others." Brief of Respondent, No. 87-5367, p. 33.

death sentence in this case was grounded on precisely the type of criterion which the state in Booth expressed acknowledged would indeed be improper.

A. The Imposition of Differing Sentences Based on the Perceived Moral or Societal Worth of Crime Victims Violates the Equal Protection Clause

A month ago Judge Jack Hampton of the Texas District Court openly proclaimed that it was his policy to impose lesser sentences in murder cases if the victim was either a prostitute or a homosexual. The Executive Director of the Texas Commission on Judicial Conduct, asked to comment on that sentencing standard, remarked, "I can't right off think of any part of the code that might violate."[4] Judge Hampton's sentencing practice, like

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[4] New York Times, Dec. 17, 1988.

the closing argument in the instant case,[5] violates one of the core meanings of the equal protection clause.

The debates of the Congress which approved the fourteenth amendment make clear that the framers understood the equal protection clause to embody two quite distinct but equally important principles. First, of course, the equal protection clause was recognized to prohibit invidious discrimination, an abuse then referred to as the making of distinctions on the basis of "class" or "caste."[6] The second agreed upon meaning

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[5] This Court held in McCleskey v. Kemp, 95 L.Ed.2d 262, 278 n. 8 (1987), that a sentencing decision based on unconstitutional distinctions among crime victims violates the rights of the person so sentenced to equal protection and to freedom from arbitrary government action.

[6] Cong. Globe, 39th Cong., 1st sess. 537 (Rep. Stevens) (race), 674 (Sen. Sumner) (race), 704 (Rep. Fessenden) (caste), 707 (Rep. Fessenden) (caste), 1095 (Rep. Hotchkiss) (class), 1227 (Sen.

was that a state had an affirmative obligation to protect from attack or invasion by third parties the lives, liberty, and property of all persons within its jurisdiction. Equal protection in this second sense concerned the protection accorded by the criminal law (e.g. prohibitions against murder, kidnapping and theft) and by certain non-criminal laws (e.g., tort and conversion).[7] It required a state to extend to the life, freedom and property of every person the same full measure of legal protection that was afforded to the lives, freedom and property of others.

Sumner) (caste or color), 2766 (Sen. Howard) (class), 3035 (Sen. Henderson) (race), app. 104 (Rep. Yates) (class) (1866).

7 In the hearings of the Joint Committee on Reconstruction, which drafted the fourteenth amendment, most uses of the word "protection" are references to government protection against crimes by third parties. See Appendix C(1).

The anti-discrimination principle applies to all forms of state action, but forbids only certain invidious distinctions; the protection principle applies only to state actions related to the protection of life, liberty and property, but forbids a state to deny full and equal protection on any basis whatever.

The phrase "equal protection of the laws" was originally coined by abolitionists early in the nineteenth century to refer to the protection principle; the history of the phrase and concept are detailed by Professor ten Broek in Equal Under Law (1951). Slavery was said to deny "equal protection" because it permitted some individuals, the slaveowners, to steal the property, violate the liberty and take the lives of others, the slaves. This argument was reiterated time and again by abolitionists

in the decades before the Civil War. In an 1837 address to the Massachusetts legislature, for example, Henry B. Stanton complained that a slave was denied

> all the protection of the law as a man. His labor is coerced from him.... No bargain is made, no wage is given.... There is not the shadow of legal protection for the family state among slaves ... neither is there any real protection for the limbs and lives of slaves.... [T]he slave should be protected in life and limb, in his earnings, his family, and social relations.... To give impartial real protection ... to all ... inhabitants would annihilate slavery. Give the slave then, equal protection with his master, and at its first approach slavery and the slavery trade flee in panic, as does darkness before the full-orbed sun.[8]

Although under the slave codes some attacks on slaves and their property were forbidden, the law fixed lesser penalties for a crime against a slave or free black

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8 Quoted in J. Ten Broek, Equal Under Law, 46-67 (1951).

than for the same offense against a white.[9]

This doctrinal derivation of the equal protection clause is reflected in the first draft of section one debated by the House of Representatives in 1866; that proposal would have given Congress authority to secure "to all persons in the several States equal protection in their rights of life, liberty and property."[10] Representative Wilson referred to the more elaborate theory familiar to congressmen on both sides of the aisle when he asserted

> "the right of being protected in life, liberty, and estate is due to all, and cannot be justly denied to any...." [T]he State that does not give protections to the life, liberty, and

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9 See W. Rose, A Documentary History of Slavery in North America, 193-94 (1976) (text of Alabama Slave Code).

10 Cong. Globe, 39th Cong., 1st sess. 1034.

> property of all men violates its duty, because every person has this due him for his allegiance to the Government....[11]

Even some who opposed the fourteenth amendment agreed that every state had a duty to give full and equal protection to the lives, liberty and property of all; they objected only that any needed corrective measures should come from the states themselves.[12]

The debates on the fourteenth amendment, to be sure, reveal as well a universal understanding that it would prohibit invidious discrimination. But it is entirely clear from those debates that the phrase "equal protection of the laws" was understood to encompass at least two distinct doctrines, entitlement to full and equal protection of life, liberty and

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11 Id. at 1225.

12 Id. at 1064 (Rep. Hale), App. 138 (Rep. Rogers).

property, and a prohibition against invidious discrimination. Representative Eliot, for example, described section one as including several distinct components, prohibiting "State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the State the equal protection of the laws."[13] Representative Rogers, who evidently agreed with the protection principle, nonetheless refused to accept the non-discrimination principle, arguing in favor of governmental racial discrimination in other areas, such as marriage and school segregation.[14]

Insofar as the protection by a state

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13 Id. at 2511.

14 Compare id. at app. 134 with id. at app. 138.

of life, liberty and property is concerned, the equal protection clause is not a provision which tolerate some but not other distinctions, but a prohibition against any distinctions whatsoever. Senator Wilson emphasized that the state's obligation to provide protection extended to all men, women and children in the jurisdiction; "Every human being in the country, black or white, man or woman, or little child in the cradle, has a right to be protected in life, in property, and in liberty."[15] Senator Poland insisted "All the people, or all the members of a State or community, are equally entitled to protection."[16] Senator Stewart recognized "the obligation of full protection for all men."[17] The requirement that blacks

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15 Id. at 1255.

16 Id. at 2962.

17 Id. at 2964.

receive equal protection was merely an incidental application of the general rule that all persons were to be so treated:

> [W]e do say that all men are equally entitled ... to the protection of the law, and that the weak need the protection of the law more than the strong; and we do say now that the negro in the south is manumitted ... he must be protected....[18]

Representative Pomeroy stressed that the degree of protection afforded to life, liberty and property could not vary in any way from person to person: "[E]very person should have the safeguards of law weighed out in equal and exact balances."[19] Representative Bingham

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18 Id. at 3528 (Sen. Stewart).

19 Id. at 1182; see also id. at 2459 (Rep. Stevens) (Congress must assure "that the law which operates upon one man shall operate equally upon all.... Whatever means of redress is afforded to one shall be afforded to all.") (emphasis in original), 2539 (Rep. Farnsworth) ("Is it not the undeniable right of every subject of the government to receive 'equal protection of the laws' with every

called on Congress to guarantee "equal, exact justice" by assuring "that the protection given by the laws of the State shall be equal in respect to life and liberty and property to all persons."[20]

When Representative Hale stated that he understood "the whole intended practical effect" of the first draft of section 1 to be "the protection of 'American citizens of African descent'", Representative Bingham immediately rose to disagree, explaining that the Joint Committee on Reconstruction -- which reported both that and the final version of the fourteenth amendment -- was equally concerned to afford protection to the "hundreds of thousands of loyal white citizens" facing abuse in the south.[21]

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other subject?")

20 Id. at 1094.

21 Id. at 1065.

The hearings of the Joint Committee, which were reprinted for and referred to by other members of Congress, contained extensive testimony regarding attacks on union loyalists in the former rebel states,[22] and concerning the unwillingness of local officials to protect their lives, liberty and property.[23] The report of the Joint Committee which accompanied the final draft of the fourteenth amendment emphasized the need to deal with this problem.[24] The congressional debates on the fourteenth amendment contained frequent references to the mistreatment of

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22 See Appendix C(2).

23 See Appendix C(3).

24 Report of the Joint Committee on Reconstruction, 39th Cong., 1st sess. xvi (southern loyalists "denounce[d] and revile[d])," xvii ("without the protection of United States troops, Union men, whether of northern or southern origin, would be obliged to abandon their homes"), xviii (southern loyalists "bitterly hated and relentlessly persecuted").

and southern hostility towards union supporters.[25] Proponents of the equal protection clause stressed that it would protect unionists who had remained in the south, union sympathizers who had fled north, former Union soldiers, and northerners visiting the south.[26] No one, however, described hostility to these groups as being based on "class" or "caste" -- the terms of that era for invidious discrimination. Union

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25 Cong. Globe, 39th Cong., 1st sess. 739 (Sen. Lane), 834 (Sen. Clark), 1091-94 (Rep. Bingham), 1182 (Sen. Pomeroy), 1184 (Sen. Henderson), 1228 (Sen. Sumner), 2535 (Rep. Eckley), 2537 (Rep. Beaman), 2542 (Rep. Bingham), 2800 (Sen. Stewart).

26 Id. at 1066 (Sen. Clark) (northerners), 1084-85 (Sen. Davis) (loyalists), 1094 (Rep. Bingham) (union soldiers), 2536 (Rep. Eckley) (union refugees), 2537 (Rep. Beaman) (loyalists), 2540 (Rep. Farnsworth) (loyalists), 2798 (Sen. Stewart) (loyalists); also id. at 1090 (Rep. Bingham) (aliens), 1757 (Sen. Trumbull) (aliens), 2890 (Sen. Howard) (aliens), 2891 (Sen. Cowan) (aliens).

supporters and northerners were to receive equal protection against attacks on their lives, liberty and property, not because of the motives behind those attacks or the official indifference to them, but because everyone was entitled to that protection, regardless of why he or she might need it.

The most detailed and impassioned explanations of the concept of equal protection denounced differences based on the wealth and status of the victim. Representative Bingham, one of the framers of section one, argued:

> [A]ll men are equal in the rights of life and liberty before the majesty of American law. Representatives, to you I appeal, that hereafter, by your act and the approval of the loyal people of this country, every man in every state of the Union, in accordance with the written words of your Constitution, may, by the national law, be secured in the equal protection of his personal rights ... no matter what his color, no matter beneath what sky he may have been born, no

> matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant.[27]

Senator Wilson deplored the social and legal system of the south as a vestige of the worst of old world "aristocracies or oligarchies," which raised or lowered criminal punishments according to whether the victim was a "noble" or a "plebian."[28] Representative Donnelly asked

> Are [the] sacred pledges of life, liberty and property to fall to the ground? Shall the old reign of terror revive in the South, when no northern man's life was worth an hour's purchase. Or shall that great Constitution be what its founders meant it to be, a shield and a protection over the head of the lowliest and poorest

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27 Id. at 1094.

28 Id. at 683.

> citizen in the remotest region of the nation?[29]

Senator Howard, observed that the equal protection clause of the Fourteenth Amendment,

> establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives the most powerful, the most wealthy, the most haughty.[30]

In demanding protection for freedmen facing oppression in the former confederate states, Senator Wilson relied not on the anti-discrimination principle, but on the protection doctrine embodied in the equal protection clause:

> [T]he poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and

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29 Id. at 586.

30 Id. at 2766; see also id. at app. 256 (Rep. Baker).

> proudest man in the land.... [T]he poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land.... [T]he poor man's cabin, though it may be the cabin of a poor freedman in the depths of the Carolinas, is entitled to the protection of the same law that protects the palace of a Stewart or an Astor....[31]

That is the meaning of the words engraved over the portico of the building in which this Court sits.

This concept of equal protection is utterly incompatible with any notion that a statute, judge or jury might value the lives of some persons more highly than the lives of others.[32] Representative Baker

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31 Id. at 343.

32 This aspect of equal protection does not, of course, preclude special treatment of murders which not only take a life but which also, in the judgment of a legislature, seriously interfere with the functioning of government, see Appendices A and B, or are perpetuated against

insisted that "[t]rue democracy, like true religion, recognizes the inherent and immeasurable value of man, and of all men."[33] Senator Clark acknowledged that society might be more affected by the death of one person than by that of another, but insisted that the law could not on that account treat the killing of one person as less blameworthy than the killing of another:

> Was not your Government founded upon that idea -- the idea of political equality of all men? Is [a black man] not entitled to his life as clearly and fully as the white man? That life may not be of the same consequence in the community as another life, but be it of more or less value, is not the negro just as such entitled to it as any other man can be to his?

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particularly vulnerable victims. See Del. Code Ann. tit. 11, § 4209(e)(q)(1982 supp.) (aggravating circumstance if "[t]he victim was severely handicapped or severely disabled.")

33 Cong. Globe, 39th Cong. 1st sess. app. 257 (emphasis in original).

> And has he not a right just as good to have it protected by law?[34]

A sentencing procedure which effectively required, or even allowed, a defendant to argue or seek to prove that his victim was of inferior moral or societal worth, entitled to only half-hearted protection by the legal system, would be more than a dangerous diversion from legitimate considerations, Booth v. Maryland, 96 L.Ed.2d at 451; to put the very victim of a crime on trial in this manner would offend one of the central guarantees of the fourteenth amendment.

As individuals we mourn with special sorrow the death of men and women whose particular gifts and promise we may have valued most highly. But the Constitution knows no such distinctions. The Fourteenth Amendment attaches to the

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34 Id. at 833 (emphasis added).

lives of those born in the opulence of Park Avenue, Palm Beach and Beverly Hills precisely the same immeasurable value that it recognizes in the lives of those who sleep on the heating vents on the Mall, who carry all their worldly possessions in a shopping cart, or who speak in unintelligible cadences to voices that none other hear. In other lands and under other legal systems, the measure of redress and punishment may yet be calibrated to the status and stature of the interested parties, but in the United States of America victim and perpetrator alike are neither rich nor poor, black nor white, revered nor reviled, believer nor heretic, but only persons whose greatest birthright is their equality.

B. The Eighth Amendment Precludes Basing the Magnitude of a Sentence on the Perceived Moral or Societal Worth of the Victim

Six years ago this Court held in California v. Ramos, 463 U.S. 992 (1983), that the range of factors which might be considered by a sentencing jury, although extremely broad, was nonetheless subject to several specific constitutional constraints. Ramos recognized that individualized sentencing decisions would require a jury "to consider a myriad of factors to determine whether death is the appropriate punishment," 463 U.S. at 1008, and Zant v. Stephens, 462 U.S. 862 (1983), made clear that a state was not required to spell out in a statute every aggravating consideration which a jury might take into account. 462 U.S. at 875. On the other hand, Ramos squarely held that the eighth amendment did impose

"substantive limitations on the particular factors that a capital sentencing jury may consider." 463 U.S. at 1000. One such constitutional constraint, Ramos noted, was that a jury could not utilize a standard which "might lead to the arbitrary and capricious sentencing patterns condemned in Furman [v. Georgia, 408 U.S. 238 (1972)]." Id.; see also Godfrey v. Georgia, 446 U.S. 420, 428 (1980). Zant held that a state could not "attac[h] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example race, religion, or political affiliation...." 462 U.S. at 885. See also McCleskey v. Kemp, 95 L.Ed.2d 262, 278 n. 8 (1987); Gregg v. Georgia, 428 U.S. 153,\198 (1976).

Petitioner appears to contend that the constitution permits a capital sentencing decision to be based on the personal opinions of individual jurors regarding the value to society or the moral worth of a murder victim. That question arises in the instant case because the prosecution's closing argument appealed to the jury to base its sentence on just such opinions. See part II, infra. The constitutional issue here is the same as that which would arise if the judge had expressly instructed each juror to make a personal evaluation of the character and societal worth of the victim, and to consider that opinion in deciding on the appropriate sentence. We urge that the use of such personal opinions to decide whether a capital defendant will live or die is inconsistent

with Ramos, Zant and Gregg. See McCleskey v. Kemp, 95 L.Ed.2d 262, 278 n. 8 (1987).

If a deliberate attempt were to be undertaken to reintroduce into the capital sentencing process all the arbitrariness and potential for bias that flawed the pre-Furman capital punishment schemes, it would be difficult to concoct a more effective scheme for doing so than petitioner's proposal that jurors base sentencing decisions on their personal opinions about the character or value to society of a murder victim. This is not a case in which a legislature has determined that a specific governmental function, such as that of a police officer, is of unusual importance to society, and a jury has been authorized to make a factual determination as to whether the victim was in fact a police officer killed in the course of his or her duties. Rather, what

petitioner proposes is that each particular jury or other sentencing authority, choose for itself, from among the universe of personal characteristics and societal roles, those which it thinks are deserving of special protection. Petitioner asks, not that the jury in this case be permitted to implement a decision of the South Carolina legislature to extend such heightened protection to certain positions, but that each and every jury in South Carolina be permitted to make such legislative decisions for itself.

The statutes sustained in Gregg and its progeny were upheld because the objective standards they contained substantially reduced the danger that jurors would ground sentencing decisions on their personal social, political, or economic views, opinions often irrelevant

to the sentencing process and in many instances constitutionally impermissible. But a rule that based a sentencing decision on the "personal characteristics" or "value to society" of the victim would not simply permit, but quite literally require jurors to use such social, political, economic beliefs to decide which defendants would live and die. There is probably no question about which Americans are more likely to disagree than the identity of the individuals, other than certain critical government officials, who are of greatest value to our society, and whose deaths would be a particularly serious loss. The personal opinions which Furman, Gregg and Zant insist ought be irrelevant to the sentencing process would have to be relied on by a juror asked to assess the value to society, for example, of a union shop

steward, a venture capitalist, a newspaper columnist, a television evangelist, a professional lobbyist, a tobacco company lawyer, or a gun store owner.

A sentencing process based on such jury determinations would readily, perhaps inexorably, be tainted by considerations that would be constitutionally impermissible. That problem would inevitably extend to and taint the jury selection process; a prosecutor would naturally select a venue and exercise his peremptory challenges in order to craft a jury whose political, economic and social views would lead them to place particular value on the contributions of the victim. Regardless of the prosecutor's actions, a capital punishment statute would often have a different meaning in various parts of a single state depending on local mores and interests; thus within New York the

societal function deemed by local juries to be of particular value might be apple farmers in Cortland, oysterman on Long Island, the ski patrol in the Catskills, and Transit Authority workers in Manhattan. At best such a sentencing scheme would be a lottery, in which the life or death of a capital defendant would turn on the particular mix of social, economic and political views that chanced to prevail among the randomly selected jurors passing on his fate.

A sentencing decision based on the "personal characteristics" -- as distinct from value to society, to the extent that such a distinction could be made -- would be even more arbitrary. The personal characteristics on which a jury or judge might choose to rely are virtually

limitless.[35] In the instant case the prosecutor focused on the victim "as a religious person and the possessor of a voter registration card". (Pet. R. Br. 49). The Victim Impact Statement in Booth stressed that the victims there "had worked hard ... attended the senior citizens' center and made many devoted friends" 96 L.Ed.2d at 453. In Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987), the state emphasized that the victim had been "an honor graduate in high school" and was about to enter college.[36] A juror might

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35 See McCleskey v. Kemp, 95 L.Ed.2d 262, 295 n. 4 (1987) ("Some studies indicate that ... offenders whose victims are physically attractive receive harsher sentences than defendants with less attractive victims.")

36 809 F.2d at 748-49 n.12 (Johnson, J., concurring and dissenting); see also Moore v. Zant, 722 F.2d 640, 651-52 (11th Cir. 1984); Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983) (victim a star athlete and social worker assisting underprivileged children).

well find virtually incomprehensible a request that he or she decide which of these personal characteristics militated for or against the death penalty. It is difficult to imagine how a juror, or a member of this Court, would go about deciding whether, and if so to what degree, a sentence of death would be supported by evidence that the victim was pious, diligent, friendly, a registered voter, a regular participant in senior citizen activities, or had good grades. It is equally difficult to imagine how an appellate court could "rationally review[]" the correctness of a capital sentence that turned on a jury's assessment of the moral or societal value of the victim. Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

In assessing whether a particular sentencing system comports with the eighth

amendment, this Court refers to prevailing values reflected in state legislation. Thompson v. Oklahoma, 101 L.Ed.2d 702, 710 (Stevens, J.), 739-42 (Scalia, J. dissenting) (1988). Viewed in that context, a sentencing scheme which permitted jurors to rely on their personal opinions about a victim's character and value to society would be a unique, and virtually unprecedented, aberration. Among the 37 states which authorize the imposition of capital punishment, there is not a single statute which authorizes a sentencing jury or judge to consider the "personal characteristics" of the victim, or to assess the victim's "value to society." The South Carolina capital statute does not authorize a jury to attempt to consider such factors.

Many states, as Justice White observed in Booth, 96 L.Ed.2d at 458 n.2,

do single out certain primarily governmental positions, particularly police officers, for special treatment, either in defining capital murder or in the statutory list of aggravating factors.[37] But these statutes share two characteristics which emphasize the constitutional defects in petitioner's proposal. First every one of these statutes identifies specifically which government functions may -- and by omission may not -- be accorded particular value in the sentencing process, leaving the jury or judge no discretion whatever in the matter. In South Carolina, for example, the legislature has specified that the killing of a police officer, a judge or a prosecutor is an aggravating factor. S.C. Code Ann. § 16-3-

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[37] We set forth a list of those statutes in Appendix A.

20(c)(a)(5)-(7) (1986). If neither these nor any of the other statutory aggravating factors is present, a South Carolina jury cannot impose the death penalty, regardless of whether it believes the murder victim -- a mayor, for example-- was of great value to society; conversely, if the victim was a police officer, the jury must find the presence of an aggravating factor, even though it may believe the particular officer involved was so corrupt or inept that he should have been dismissed.

Second, all of the state capital statutes concerning killings of police, corrections, judicial and prosecution officials apply only to murders occurring in the course of, or in connection with, the victim's duties. Thus in South Carolina the killing of a police officer is only an aggravating factor if the

officer was murdered "while engaged in the performance of his official duties". S.C. Code Ann. § 16-3-20(c)(a)(7).[38] These statutes protect essential government functions, they do not attach increased importance to the lives of individuals as such. No state in the union attaches greater culpability to the killing of an adulterer by a jealous spouse, or to the random killing of a man on a park bench, solely because the victim was an off duty police officer.

In his dissent in Booth Justice White argued that "determinations of appropriate sentencing considerations are peculiarly questions of legislative policy". 96 L.Ed.2d at 458. It is precisely that

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38 See Appendix A. A number of other states address this issue, not by referring to the killing of certain officeholders, but by attaching special significance to any murder committed for the purpose of interfering with a governmental activity. See Appendix B.

legislative policy that is absent in this case. The Attorney General of South Carolina argues that a jury ought treat as an aggravating factor the "status" of the victim as "a judge, a policeman, or a street minister". (Pet. Br. 56). The simple answer is that the South Carolina legislature has made a different choice, to treat as an aggravating factor only the killing of judges and policemen, but not the murder of a "street minister," and to do so, not for every individual who has that particular "status", but only for individuals killed during or in connection with the conduct of their official duties. Petitioner asks this Court to authorize jurors in South Carolina to "substitute their own views for those of the state legislature as to the particular substantive factors to be considered in sentencing a capital defendant."

California v. Ramos, 463 U.S. 992, 1000 (1983).

We do not suggest that the South Carolina legislature could not extend such special protection to additional functions which it thought of critical value to society. Other states have constitutionally chosen to do so, treating as aggravating factors the killing, in connection with their official duties, of witnesses, jurors, and defense lawyers. A state legislature might choose to attach particular value to a non-governmental function; a Washington statute, for example, treats as an aggravating factor the killing of a reporter in order to hinder an investigation of the killer. Wash. Rev. Code Ann. § 10.95.020(10) (1981). But the selections of the public or quasi-public functions deserving such special protection "are peculiarly

questions of legislative policy." California v. Ramos, 463 U.S. at 1000. Neither Sought Carolina nor any other state treats as an aggravating factor the killing of a minister or registered voter, and it is entirely inconceivable that any legislature in the United States would authorize a jury, in deciding whether to impose the death penalty, to consider whether the victim was or was not religious, or adhered to a particular religious creed. To uphold a death sentence based on considerations which no legislature has authorized or would approve would be to stand eighth amendment jurisprudence on its head.

C. THE CONSTITUTIONAL ISSUE PRESENTED BY THIS CASE SHOULD BE DEFINITIVELY RESOLVED

Because no statute authorizes a sentencing decision to be based on a jury's or judge's personal opinions about

what constitutes moral or societal worth, there are only a handful of reported cases in which a prosecutor sought to win a capital sentence on such a basis. The instant case is particularly unique because the prosecutor asked the jury to ground its sentencing decision on the fact that the victim was "a religious person". State v. Gathers, 369 S.E.2d 140, 143 (S.C. 1988). Although that argument raises serious problems under the Establishment Clause, we believe it would be inappropriate to resolve this case on first amendment grounds; to do so would be to require respondent to run the risk that on remand the prosecutor would again urge the jury to impose the death penalty because the victim in this case was a registered voter. That argument violated the eighth and fourteenth amendment when it was advanced at the original sentencing

hearing, and the Court should not leave the prosecutor free to repeat that violation.

Equally importantly, the efficient administration of justice would be ill-served by a decision in this case which, rather than addressing the permissibility as such of basing a sentencing decision on the perceived moral and societal worth of the victim, dealt only with the particular personal characteristics -- piety and voter registration -- on which the prosecutor happened to rely in this case. A decision by this Court leaving open the possibility that other personal-characteristic arguments might be upheld would inevitably encourage a form of abuse that has hitherto been comparatively rare; the capacity of a constitutional decision to actually encourage misconduct was well illustrated

by experience under Swain v. Alabama, 380 U.S. 202 (1965). See Batson v. Kentucky, 476 U.S. 79 (1986).

In the absence of a definitive resolution of the constitutionality of personal characteristic arguments, the prosecutor on remand in this case, like prosecutors in literally thousands of capital cases in years ahead, would be invited to seize upon some other personal characteristic of the victim as a basis for a sentence of death. A decision on eighth or fourteenth amendment will pretermit this entire problem, but a decision addressing only the specific prosecution arguments in this case would in all probability launch a major new branch of constitutional jurisprudence, requiring the courts to assess on a case by case basis the constitutionality of sentences based on every conceivable

function valuable to society that a given victim might have played, and on any imaginable laudable personal character trait that a particular victim might have possessed.

Equally seriously, for this Court to suggest that the lives of some human beings may constitutionally be accorded greater value and protection would necessarily legitimize and encourage the view that other lives are entitled to less. The dangers with which the framers of the equal protection clause were concerned remain real, if more complex, today. The failure of the criminal justice system to provide protection for wives from spousal abuse, for example, remains a widespread problem. Judicial suggestions that lethal attacks on certain types of individuals are less deserving of punishment would inevitably shape the

willingness of the police to investigate such crimes, and would imply to members of the public that such murders enjoy a degree of official sanction or tolerance.

II. THE PROSECUTOR'S CLOSING ARGUMENT ENCOURAGED THE JURY TO BASE THE SENTENCING DECISION ON ITS PERCEPTION OF THE MORAL OR SOCIETAL WORTH OF THE CRIME VICTIM

Booth, of course, did not hold that evidence regarding the personal characteristics of a victim may never be introduced or referred to by a prosecution; on the contrary the Court observed in Booth that in a particular case such evidence may be relevant to a material issue regarding either guilt or sentencing. 96 L.Ed.2d at 451 n.10. Evidence regarding the religious views of a victim, or defendant, may in some instances be relevant to such a legitimate

issue.[39] Booth admonished, however, that the courts must assure that the probative value of evidence regarding the personal characteristics of a victim outweighs any prejudicial effect. Id.[40] The courts must also be certain that the purported relevance of personal-characteristic

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[39] In a murder prosecution arising out of a fight between the victim and defendant, for example, it might be of controlling importance which participant had initiated the fight and which was defending himself; in resolving that issue a jury might well consider whether either participant adhered to moral views--whether of a sectarian or secular origin -- which condemned violence other than in self defense. At a sentencing hearing a defendant's attitude towards violence would be material to his future dangerousness, Franklin v. Lynaugh, 101 L.Ed.2d 155, 168 (White, J.) (1988), and that attitude might be demonstrated by the moral tenets to which he adhered, whether they were the principles of his purely personal philosophy, of the Ethical Culture Society or of an organized religious group.

[40] Brooks v. Kemp, 762 F.2d 1383, 1409 (5th Cir. 1985); Moore v. Kemp, 809 F.2d 702, 748 (11th Cir. 1987) (Johnson, J., concurring and dissenting).

evidence or argument does not itself turn on unreliable or class based stereotypes or assumptions.[41]

The instant case involves, not the admissibility of evidence, but the content and likely impact on the jury of the prosecutor's argument at the penalty phase of the trial. A substantial portion of the prosecutor's closing argument dwelt on the religious views of the victim. The South Carolina Supreme Court concluded that "[t]hese remarks conveyed the suggestion appellant deserved a death

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[41] In the instant case, for example, the South Carolina Attorney General appears to suggest that detailed comments about the religious character of the victim were appropriate because that evidence indicated that the victim was less able or inclined to defend himself as a result of his piety. If religious belief actually tended to render the pious incapable of using force against others, the United States Army would not have a large corps of chaplains, and words like "crusade" and "jihad" would not be part of our vocabulary.

sentence because the victim was a religious man and a registered voter." Id. Petitioner does not dispute this description of the unavoidable effect on the jury of the state's closing argument, and could not plausibly do so. The prosecutor's closing remarks are devoid of any contention that the victim's piety or voter registration were evidence of some other legally relevant fact; the prosecutor baldly dwelt at length on several aspects of the victim's character and admonished the jury to consider them when deciding on the appropriate sentence. In the absence of a clear and unequivocal argument specifically relating a victim's personal characteristics to some other factor which a jury might legitimately consider, any prosecutorial reference to such characteristics will necessarily suggest that the characteristics are

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sufficient by themselves to support a sentence of death. No juror could have understood the prosecutor's remarks in the instant case in any other way.

Petitioner urges, however, that the validity of the jury's sentencing decision does not depend on the objective meaning of the prosecutor's closing remarks, but turns instead on the subjective intent with which the prosecutor spoke. (Pet. Br. 45). So long as the prosecutor did not actually intend to encourage the jury to vote for death because of the victim's piety and voter registration, the state appears to contend, it simply is not relevant that the actual remarks made by the prosecutor had precisely that effect. Petitioner relies heavily on the decision in Donnelly v. DeChristoforo, 416 U.S. 637 (1974), that the courts will not "lightly infer that a prosecutor intended" to

violate the constitutional rights of a defendant. (Pet. Br. 45).

The bona fides of the prosecutor's argument in this case, we submit, are not the controlling issue. It was the jury, not the prosecuting attorney[42], which fixed the sentence of death, and if there was a significant danger that the jury based its decision on a constitutionally impermissible consideration -- as was surely the case here -- it would be of no significance that the prosecutor harbored deeply felt but never articulated hope that the jury would not do so. "The question ... is not what" the prosecutor intended, "but rather what a reasonable juror could have understood the [argument]

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42 Of course, if a prosecutor's decision to seek the death penalty were tainted by a constitutionally impermissible consideration, that penalty could not stand. See McCleskey v. Kemp, 95 L.Ed.2d 262 (1987).

as meaning." Francis v. Franklin, 471 U.S. 307, 315-16 (1985); see California v. Brown, 93 L.Ed.2d 934, 940 (1987). This case, unlike Donnelly, 416 U.S. at 613, does involve the violation of a specific substantive constitutional rights, not merely a general claim of unfairness., See Caldwell v. Mississippi, 472 U.S. 320, 339-40 (1980). We urge that the South Carolina Supreme Court correctly focused on the objective meaning of the prosecutor's closing remarks, and properly eschewed any inquiry into the prosecutor's subjective intent.

Our advocacy of this objective standard, however, should not be understood to suggest that there is any possibility that the prosecutor in this case did indeed act in good faith. On the contrary, the record reveals a consistent and extraordinarily persuasive effort to

bias the jury's decision -- at the guilt as well as the penalty phase -- with concern for the religious views of the victim. Although the victim in this case had no religious training or position, the prosecutor referred to him as "Reverend" or "Reverend Minister" Haynes on 4 occasions in his opening statement, 13 times in his closing statement on guilt, and 16 times during his closing statement regarding penalty.[43] At the beginning of the trial the prosecutor emphasized to the jury that the victim was "a very, very religious person" who "had many, many

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[43] Tr. 554-55, 1036-56, 1205-11. The only foundation of these references was an isolated statement by the victim's mother that the victim liked to call himself Reverend Minister. Id. at 563. Neither the victim's mother nor any other witness ever themselves referred to the victim as Reverend. In colloquy with the trial judge outside of the presence of the jury, the prosecutor referred to the victim simply as "Richard Haynes." Id. at 1179.

religious items -- Bibles, rosaries, statues."[44] In his closing argument at the end of the guilt phase, the prosecutor urged:

> [P]ut in your mind's eye, if you would, the perspective of Reverend Minister Rickey Haynes. What do we know about him? .... [H]e was a religious person. You will have his Bibles there. You will see his rosary beads. His statues of little angels.[45]

The critical factual issue at the guilt phase was whether Gathers was actually the person who stabbed and sexually assaulted the victim;[46] the Bibles, angels and rosary beads obviously could not help to identify the victim's assailant. Even if the victim's religious views had been

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[44] Tr. 553; see also id. at 554 ("This religious person -- who, by the way, called himself Reverend Minister Haynes.")

[45] Tr. 1051.

[46] Tr. 1032-77.

relevant to some issue at the penalty phase -- which they clearly were not -- no legitimate purpose was served by the prosecutor's insistence on reading to the jury the full text of a prayer that had been in the victim's possession, or by the repeated references to the religious objects in the victim's possession at the time of the killing. It is not unduly cynical to suggest that none of this would have occurred had the victim adhered to non-orthodox religious views, and had in his possession not an angel, a bible, and the Game Guy's Prayer, but a voodoo doll, a satanic tract, and a blessing written by the Ayatollah Khomeini.

The state's effort to justify the prosecutor's conduct is entirely unavailing. In this Court the state does not even attempt to provide any explanation of the reading of the Game

Guy's Prayer, the repeated reference to the victim's bibles, rosary beads, and angels, or the closing argument about Haynes' voter registration card. The Attorney General asserts that some reference to the victim's religion was appropriate because "[s]imply put, it was the state's theory of the case that the motive and reason that Ricky Haynes was assaulted and murdered was because he .... was willing to talk to people all the time about the Lord from the park bench." (Pet. Br. 46). In fact the theory of the case which the prosecutor actually presented to the jury was precisely the opposite--that Haynes was attacked after he <u>refused</u> to talk to his assailants,[47] and that Gathers was particularly culpable because he was <u>indifferent</u> to the fact that his

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47 Tr. 554, 631, 1053-54.

victim happened to be a religious person.[48]

The state urges, in the alternative, that under Booth a prosecutor may indeed urge a jury to impose the death penalty based on the personal characteristics of the victim, so long as the evidence on which the prosecutor relies was first introduced for some other reason. (Pet. Br. 22, 24, 47, 50). Once testimony regarding Haynes' religious views had been admitted for another purpose, the state suggests, the prosecutor was free to argue that it was a more serious crime to kill a pious man than to kill an atheist or an agnostic. Were that the law, a prosecutor could constitutionally urge a jury to impose capital punishment because the

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48 Tr. 1208 ("[T]his defendant Demetrius Gathers cared little about the fact that [Haynes] is a religious person").

victim was white, or belonged to the same religious denomination as the jurors or supported a particular political party, so long as the underlying facts had already been disclosed to the jury for other reasons.

CONCLUSION

When most of North America was still an untamed wilderness, Sir William Hawkins wrote that it was equally murder to kill "any person, whatsoever nation or religion he be of, or of whatever crime attainted." A Treatise of the Pleas of the Crown, v. 1, p. 80 (1716).[49] Two and a half

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49 See also W. Blackstone, Commentaries on the Laws of England, v. iv, pp. 197-98 (murder includes the killing of any person "'under the Kings peace,' at the time of the killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the King's peace and protection, is as much murder as to kill the most regular-born Englishman") (1765); T. Wood, An Institute of the Laws of England, 352 (murder to kill any "reasonable creature, man or woman, subject or alien; whether attainted of

centuries of jurisprudence have not improved upon that formulation. This case does not call for the invention of any new, unprecedented legal theory; we ask only that the Court adhere to principles of justice that were already of ancient vintage when they were written into tne Constitution by the framers of the eighth and fourteenth amendments. The decision

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treason or felony, ... Christian or heathen. And the reasonable creature must be born alive.") (3rd ed. 1724).

of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

CAPITAL STATUTES CONCERNING PUBLIC OR QUASI-PUBLIC OFFICIALS

Alabama Code (1982)

§13A-5-40 (a)(5) (law enforcement official when "on duty or because of some official or job related act")

§13A-5-40(a)(7)(present or former federal or state official if murder "stems from or is related to his official position act or capacity")

Arkansas Code Annotated (1987 Supp.)

§5-10-101(a)(3)(law enforcement or corrections officer, firefighter, judge, court official, parole or probation officer, or military personnel "when such person is acting in line of duty")

§5-10-101(a)(5)(holder of any public office "filled by election or ap-

pointment or a candidate for public office")

California Penal Code (1987 Supp.)

§190.2(a)(7)(peace officer whom defendants "knew or should reasonably have known" was "engaged in the performance of his duties" or who was killed "in retaliation for the performance of his official duties")

§190.2(a)(8)(federal or state law enforcement officer whom the defendant "knew or should reasonably have known" was "engaged in the performance of his duties" or who was killed "in retaliation for the performance of his duties")

§190.29a)(9)(fireman whom defendant "knew or reasonably should have known . . . was a fireman engaged in the performance of his duties")

§190.2(a)(10)(witness killed to prevent or in retaliation for testimony)

§190.2(a)(11)(prosecutor killed "in retaliation for or to prevent the performance of the victim's official duties")

§190.2(a)(12) (present or former judge killed "in retaliation for or to prevent the performance of the victim's official duties")

§190.2(a)(13)(present or former federal, state or local official killed "in retaliation for or to prevent the performance of the victim's official duties")

Colorado Revised Statutes (1986)

§16-11-103(6)(c) (firefighter, elected official, state or local peace officer, present or former federal law enforcement officer "killed . . . while such person was engaged in his

official duties, and the defendant knew or reasonably should have known that such victim was such a person engaged in the performance of his official duties, or the victim was intentionally killed in retaliation for the performance of his official duties.)

§16-11-103(6)(k)(witness to a criminal offense killed to prevent arrest or prosecution)

Delaware Code Annotated Title 11 (1979)

§636(a)(4)(law enforcement or corrections officer or fireman "while such officer is in the lawful performance of his duties")

§4209(e)(1)(c)(law enforcement or corrections officer or fireman "while such victim was engaged in the performance of his official duties")

§4209(e)(1)(d)(prosecutor, judge or state investigator "during, or because of, the exercise of his official duty")

§4209(e)(1)(g)(witness killed to prevent testimony regarding a crime)

Georgia Code Annotated (1979)

§27-2534.1(b)(5)(present or former judge or prosecutor "during or because of the exercise of his official duties")

§27-2534.1(b)(8)(peace or corrections officer or fireman "while engaged in the performance of his official duties")

Idaho Code (1982)

§18-4003(b)(judge, executive officer, police officer, fireman, prosecutor or court officer "who was acting in the lawful discharge of an official duty, and was known or should have been known by the perpetrator of the murder to be an officer so acting")

(1987)

§19-2515(g)(9)(present or former peace officer, judge or prosecutor killed "because of the exercise of official duty")

§19-2515(g)(10)(witness or potential witness in a criminal or civil proceeding "because of such proceeding")

Illinois Annotated Statutes, Chapter 38 (1987 Supp.)

§9-1(b)(1)(peace officer or fireman killed "in the course of performing his official duties" if defendant "knew or should have known that the murdered individual was a peace officer or fireman")

§9-1(b)(2)(corrections official killed "in the course of his official duties")

§9-1(b)(8)(witness or informant against defendant in a criminal proceeding)

Indiana Code Annotated (1987 Supp.)

§35-50-2-9(c)(b)(murder of "a corrections employee, fireman, judge, or law enforcement officer and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty")

Kentucky Revised Statutes Annotated (1981)

§532.030(a)(5)(prison employee killed while "engaged . . . in the performance of his duties" by an inmate)

§532.030(a)(7)(police officer "engaged at the time of the act in the lawful performance of his duties")

Louisiana Revised Statutes (1982)

§14.30(2)(law enforcement corrections, parole or probation officer, judge or prosecutor while "engaged in the performance of his lawful duties")

Maryland Code Annotated (1987)

Art. 27 §413(d)(1)(law enforcement officer "murdered while in the performance of his duties")

Missouri Annotated Code (1987 Supp.)

§565.012(2)(5)(present or former judge, prosecutor or elected official "during or because of the exercise of his official duty")

§565.012(2)(8)(peace or corrections officer or fireman "while engaged in the performance of his official duty")

Montana Code Annotated (1985)

§46-18-303(6)(peace officer "killed while performing his duty")

Nebraska Revised Statutes (1985)

§29-2523(1)(g)(any official "having custody of the offender or another")

Nevada Revised Statutes Annotated (1986)

§200.033(7)(peace officer or fireman "killed while engaged in the perform-

ance of his official duty or because of an act performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or fireman")

New Mexico Statutes Annotated (1978)

§31-20A-5(A)(peace officer "acting in the lawful discharge of an official duty when he was murdered)

§31-20A-5(D)(corrections official killed by prison inmate)

§31-20A-5(F) (witness to a crime to prevent, or in retaliation for, testimony)

New Jersey Statutes Annotated (1988 Supp.)

§2C:11-3(c)(4)(b)(certain public servants killed "while the victim was engaged in the performance of his official duties or because of the victim's status as a public servant")

North Carolina General Statutes (1981 Supp.)

§15A-2000(e)(g)(law enforcement or corrections official, or present or former judge, prosecutor, juror or witness against perpetrator if killed "while engaged in the performance of his official duties because of the exercise of his official duty")

Ohio Revised Code Annotated (1982)

§2929.04(A)(1)(president, president-elect, vice-president, vice-president-elect, governor, governor-elect, lieutenant-governor, lieutenant-governor elect, or candidate for any of those offices)

§2929.04(A)(6)("law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's

specific purpose to kill a law enforcement officer")

Oklahoma Statutes (1987)

§701.12(law enforcement or corrections officer killed "while in performance of official duty")

Pennsylvania Consolidated Statutes Annotated (1982)

§9711(d)(1)(law enforcement or corrections officer or fireman "killed in the performance of his duties")

§9711(d)(s)(witness to felony committed by perpetrator, killed to prevent testimony)

South Carolina Code Annotated (1986 Supp.)

§16-3-20(a)(5)(judge or prosecutor "during or because of the exercise of his official duty")

§16-3-20(a)(7)(law enforcement or corrections officer or fireman "while

engaged in the performance of his official duties")

South Dakota Codified Laws (1988)

§23A-27A-1(4)(present or former judge or prosecutor while "engaged in the performance of his official duties or where a major part of the motivation for the offense came from the official actions of" the victim)

§23A-27A-1(7)(law enforcement or corrections officer or fireman "while engaged in the performance of his official duties")

Tennessee Code Annotated (1982)

§39-2-203(i)(9)(law enforcement or corrections officer or fireman "who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections

employee or fireman engaged in the performance of his duties")

§39-2-203(i)(10)(prosecutor or present or former judge killed, "due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office")

§39-2-203(i)(11)(elected official killed "due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official")

Vermont Statutes Annotated (1982 Supp.)

Title 13, §2303(c)(law enforcement or corrections officer killed "while in the performance of the duties of his office")

Washington Revised Code Annotated (1982)

§10.95.020(1)(law enforcement or corrections officer or firefighter "who was

performing his or her official duties at the time of the act . . .and . . . was known by the person to be such at the time of the killing")

§10.95.020(6)(judge, prosecutor, defense attorney, probation or parole officer, present or former juror, present or former witness whose murder "was related to the exercise of official duties performed or to be performed by the victim")

§10.95.020(10)(news reporter killed "to hinder the investigative, research, or reporting activities of the victim")

Wyoming Statutes (1983)

§6-4-102(h)(vii)(judge or prosecutor "dur-"ing or because of the exercise of official duty")

United States Code

18 U.S.C. §351(a)(member of Congress, member of Congress elect, agency heads, Supreme Court Justice)

18 U.S.C. §175(a)(president, president-elect, vice-president, vice-president elect, and certain White House employees)

APPENDIX B

CAPITAL STATUTES CONCERNING INTERFERENCE WITH GOVERNMENT FUNCTIONS

Alabama Code (1982)

§ 13A-5-49(5) (murder to avoid arrest or effect escape from custody)

Arkansas Code Annotated (1987)

§ 5-4-604(5) (murder to avoid arrest or escape from custody)

§ 5-4-604(7) (murder "for the purpose of disrupting or hindering the lawful exercise of any government or political function")

California Penal Code (1987 Supp.)

§ 190.2(a)(5) (murder to avoid arrest or effect escape from custody)

Colorado Revised Statutes (1986)

§ 16-11-103(6)(k) (murder to avoid arrest or prosecution or to effect escape from custody)

Delaware Code Annotated Title 11 (1979)

§ 636(a)(7) (murder to avoid arrest or effect escape)

§ 4209(e)(1)(b) (murder to avoid arrest or effect escape)

Florida Statutes Annotated (1985)

§ 921.141(5)(e) (murder to avoid arrest or effect escape)

§ 921.141(5)(g) (murder "to disrupt hinder the lawful exercise of any government function or the enforcement of the laws")

Georgia Code Annotated (1979)

§ 27-2534.1(b)(10) (murder committed to avoid or interfere with arrest or lawful custody of a police officer)

Idaho Code (1982)

§ 18-4003(f) (murder while escaping from a penal institution).

Maryland (1982)

§ Art. 27, § 413(d)(3) (murder "in furtherance of an escape" from custody)

Mississippi Code Annotated (1987 Supp.)

§ 99-19-101(5)(e) (murder to avoid arrest or escape from custody)

§ 99-19-101(5)(g) (murder "to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws")

Missouri Annotated Code (1987 Supp.)

§ 565.012(2)(10) (murder to avoid arrest or escape from custody)

Nebraska Revised Statutes (1985)

§ 29-2523(1)(h) (murder "to disrupt or hinder any governmental function or the enforcement of the laws")

Nevada Revised Satutes Annotated (1986)

§ 200.033(5) (murder to avoid lawful arrest or to effect escape from custody)

New Hampshire Revised Statutes Annotated (1986)

§ 630.5(II)(a)(5) (murder to avoid arrest or to effect escape from lawful custody)

New Jersey Statutes Annotated (1988 Supp.)

§ 2C:11-3(c)(4)(f) (murder to escape detection, apprehension, trial or confinement for another offense)

North Carolina General Statutes (1981 Supp.)

§ 15A - 2000(e)(4) (murder to avoid arrest or escape from custody)

§ 15A - 2000(e)(7) (murder "to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws")

Oklahoma Statutes (1987)

§ 701.12(5) (murder to avoid arrest or prevent prosecution)

South Dakota Codified Laws (1988)

§ 23A-27A-1(9) (murder to avoid lawful arrest or to interfere with lawful custody)

Tennessee Code Annotated (1982)

§ 39-2-203(i)(6) (murder to avoid or interfere with lawful arrest or prosecution)

Utah Code Annotated (1987 Supp.)

§ 76-5-202(1)(e) (murder to avoid arrest or escape from lawful custody)

§ 76-5-202(1)(h) (murder to prevent person from testifying, or participating in any legal proceeding or official investigation)

Washington Revised Code Annotated (1982)

§ 10.95.020(7) (murder committed to conceal the commission of a crime or the identity of the perpetrator)

Wyoming Statutes (1977)

§6-4-102(h)(v) (murder to avoid arrest or effect escape from custody)

APPENDIX C(1)

HEARINGS OF THE JOINT COMMITTEE ON RECONSTRUCTION

(1) References to "Protection"

In each quotation the emphasis is added.

Part I, pp.107-08 (Major General Hatch):

"A: [T]he negro knows that without his rights secured, and his life and property secured, he is not safe from the poor whites. He understands their antipathies towards him as well as any one does ....
Q: They need the government for their protection.
A: Yes, sir."

Part I, p.109 (Major General Thomas):

"[I]f the affairs of the Freedman's Bureau can be administered for another year in the way they have been administered for the last six months, mutual confidence would be restored between the whites and the blacks; and I am very much in hopes that the freedmen could then be left to the protection of the civil authorities of the State."

Part I, p.112 (Major General Fisk):

"A: The great mass of freedmen in the State of Tennessee ... need the protection of the government very much ...
Q: Why do they need it.
A: On account of the opposition of the people freedmen and justice to the negro."

Part I, p.114 (Major General Fisk):

"Q: Is there now safety to the Union people of the State of Tennessee?
A: ... A large delegation of the citizens of Memphis waited on me not long ago and stated that they were cruelly oppressed by the rebel element of the population in that section, and they feared the military protection was to be withdrawn from the state; and they stated to me that if the military was withdrawn those persons in most portions of West Tennessee who had been early and consistent friends of the government, and loyal to it, would be compelled to withdraw with the military."

Part I, p.119 (Lt. Colonel Cochrane):

"Q: Are the lives, and is the property of Union people of the State who have borne arms in the federal cause safe and protected at this time?
A: Yes, sir. I do not know how it would be if the troops were taken away from the State.
Q: Do you believe the troops could be safely withdrawn at this time?
A: I do not ...."

Part I, p.121 (Lt. Colonel Barnard):

"Q: Is it your opinion that [the Union people] are thoroughly protected in all their rights and privileges?
A: I think they have their rights and privileges by sufferance.
Q: What is the condition of the freedmen in Tennessee ... are they now protected in their rights of person and property?
A: As a general thing, I think they are by their employers."

Part II, p.4 (Major General Turner):

"All the people [of Virginia] are extremely reluctant to grant to the negro his civil rights -- those privileges that pertain to freedom, the protection of life, liberty and property before the laws .... They are all very reluctant to concede that; and if it is ever done, it will be because they are forced to do it."

Part II, p.7 (Judge John Underwood):

"[T]he condition of the loyal white man in Virginia at this time is worse even than the condition of the colored man, inasmuch as the colored man is protected by the military authority, while the white man is not."

Part II, p.19 (Dr. G.F. Watson):

"Q: Suppose the restraint arising from the presence of Union forces in Virginia was withdrawn, and suppose the Freedmen's Bureau was withdrawn,

what would be the condition of the loyalists and freedmen in Virginia?
A: There would be no protection for Union men, and the freedmen would necessarily suffer much.
Q: Would there be scenes of riot and violence?
A: I think it probable."

Part II, pp.23-24 (George Tucker):

"The freedman ... a Yankee ... a native-born citizen of Virginia who has been a loyal man ... all of them, will be compelled to leave [Virginia], just as soon as they cease to be protected by the national power. They cannot stay there. I am intimately acquainted with the Union men of Fairfax County ... and I do not know one of them who does not feel that he has got to leave ... . [I]f they understood that they would be surely protected in their natural and political rights, they would ... remain."

Part II, p.20 (Josiah Millard):

"A: ... [U]nless Congress relieves us by giving us some other kind of government ... that will protect the Union men, the firm Union men, who have been firm to the government, have got to leave Virginia and the south. They cannot remain there. It would not be safe for me to go back on my farm and reside there.
Q: What have you to apprehend?
A: From their threats I apprehend personal violence.

Q: Are such threats of frequent occurrence?
A: Very frequent."

Part II, p.32 (Joseph Stiles):

"A: Some persons have looked to immigration from the northern states into the south to neutralize, in great measure this rebel sentiment; but unless there is <u>protection</u> given to it, it never will be ...
Q: In case the troops were withdrawn, would you anticipate scenes of violence and riot?
A: Yes, sir,towards loyal men and freedmen I would anticipate the expulsion of loyalists."

Part II, pp.34-35 (Jonathan Roberts):

"You asked me whether Union men would be protected and allowed to live quietly if the troops were withdrawn. I have got one thing to say in that respect. If it was known publically that I came here and made this statement before you, I would not be safe one hour .... [The former rebels] are especially revengeful just as far as they think they can escape the law. All the northern people ... will tell you the same thing ... [T]hey would come and tear down my fences, and turn in their hogs and stock, and do all they could to injure me. The Union men will have no kind of show at all unless the government will <u>protect</u> them."

Part II, p.40 (Watkins James):

"I have come to the conclusion, from travelling through the country, that [the] feelings [of the former rebels] towards the freedmen, are more hostile today than they were at the close of the rebellion ... I do not regard the [Union] troops as a nuisance, because I believe they are necessary for my <u>protection</u> .... I knew damned well that I couldn't stand there twelve hours if the troops were gone .... It is a common saying, and they believe it, that we cannot stay there any longer than we are <u>protected</u> by the military."

Part II, p.47 (E.O. Dunning):

"[T]here is as bitter feeling prevalent among the people against the Union citizens at the south--those who sided with the Union cause in the rebellion -- as there was during the war. I do not think that the Union men can stay there, unless they are <u>protected</u> by the United States soldiers."

Part II, pp.49-50 (Calvin Pepper):

"Q: Suppose the Union forces were withdrawn from those localities, what result would it have?
A: I do not believe there would <u>be protection</u> to the colored people or to the loyal white men, or that it would be safe for a loyal white man to reside there.
Q: What would the rebels do?

A: I think we would not be safe in property, liberty or life.
Q: You mean to say that you apprehend scenes of violence and outrage?
A: Yes, sir."

Part II, p.55 (Madison Newby, a recently freed slave):

"A: ... In Surrey County they are taking colored people and tying them up by the thumbs ...
Q: Do they whip them just as much as they did before the war?
A: Just the same; I do not see any alteration in that. There are no colored schools down in Surrey County; they would kill anyone who would go down there and establish colored schools. They patrol our houses just as formerly ... A party of twelve or fifteen men go around at night searching the houses of colored people, turning them out and beating them. I was sent here as a delegate to find out whether the colored people down there cannot have protection. They are willing to work for a living; all they want is some protection ...

Part II, p.57 (Alexander Dunlop, a free black):

"Q: Are you a delegate to the President of the United States?
A: Yes, sir; I was sent by my people convened at a large mass meeting.
Q: For what purpose?
A: My purpose was to let the government know our situation,and what we desire the government to do for us if it can

do it. We feel down there without any protection.
Q: Do you feel any danger?
A: We do.
Q: Danger of what?
A: We feel in danger of our lives, of our property, and of everything else.
Q: Suppose the protection of the Freedmen's Bureau was withdrawn, and the Union troops were withdrawn, what would be the treatment of the whites towards the blacks?
A: In my candid opinion, the condition of the blacks would be worse than slavery .... The protection of the Freedmen's Bureau does not extend as generally throughout the country as it is hoped it will; and in some of these places where the bureau does not extend these people are treated very badly."

Part II, p.72 (John F. Lewis):

"I think that the sending of troops to our country immediately after the surrender of General Lee's army was a great protection and security to the Union people there. There were a parcel of marauders in the country who were giving a great deal of trouble."

Part II, p.97 (See C(3) (Protection of civil rights).

Part II, p.127 (Colonel Brown):

"Q: In the case of the removal of the [Freedmen's] Bureau, would you apprehend a great increase of those

scenes of violence towards the blacks?
A: I should.
Q: What would it result in?
A: I think it would eventually result in an insurrection on the part of the blacks; ... they will not endure those outrages, without any protection except that which they obtain from Virginia."

Part II, p.141 (See C(3) (Protection by courts of rights of union men.)

Part II, p.143 (General Terry):

"Q: In case of the withdrawal of military protection from Virginia what would be the condition of the loyal people in Virginia and of the blacks?
A: I think they would be in a lamentable condition. Such is the prejudice entertained, especially against those who were faithful to their obligations to the government during the war, that I do not think they would receive any adequate protection for their rights of person or property from the people or from the courts; and I think that they would be persecuted through the machinery of the courts as well as privately."

Part II, p.149 (Protection of rights in state court) (See C(3)).

Part II, pp.187-89.

A report reprinted here regarding Freedmen's Bureau activities in North Carolina contained, in a section headed "Protection", a summary of

Bureau activities to protect Freedman from murder, beatings, whipping and thefts by whites, and to punish such offenses. The section concludes, "The efforts of the bureau to protect the freedmen have done much to restrain violence and injustice."

Part II, p.197.

Newspaper account of the killing by rebels of a foreman Union scout, criticizing the local Union commander. "If he has troops enough at his command he should send a sufficient number to protect the government's servants."

Part II, p.199 (Newspaper account quoting letter from North Carolina):

"The government still continues its protection, and the troops appear at places where there is any danger of a collision of the races. The time has not yet come to wholly withdraw all military protection."

Part II, pp.202-03 (Homer Cooke):

"Q: What is [the white] treatment generally of the freedmen?
A: ... [T]he freedmen are treated much better when they are near where the Union troops are stationed; but, from all the evidence that I can gather, I believe that outside, when there is no arm to protect them, they are treated with great cruelty in some cases.
Q: Do you hear of cases of maltreatment of blacks, such as flogging ...

A: I have heard of numerous cases.
Q: How do the secessionists regard the efforts to establish schools among colored people?
A: They are not at all pleased, so far as my observations extend; and it has been very difficult to establish schools, excepting where they are directly under the military protection.
Q: Without that protection, would it be impossible in many localities in North Carolina to keep up a colored school at all?
A: I do not think it would.
Q: Would not the secessionists disperse scholars, drive out the teacher, and tear down the school?
A: I think so."

Part II, p.207 (Reverend Bain):

"I do not think it safe for the negroes to be [in North Carolina] unless some strenuous effort is made for their protection, and for the protection of loyal men. We are classed together. About three weeks ago a mob passed by my house, calling out for the 'old gray-headed son of a bitch of a Yankee sympathizer' .... I really think they will burn my house yet."

Part II, pp.207-09 (Dexter Clapp):

"These would be great danger to any northern man when military protection is withdrawn .... I think that all northern men would be in great danger of personal injury, and that the freedmen would be without any

protection whatever, and subject to great oppression and wrongs of all kinds. I think that killing freedmen would be the rule .... The high price of cotton is the only protection, aside from the military authorities, that I know of for the freedmen."

Part II, pp.218-21 (General Saxton):

"I believe that if the army were removed, the situation of northern men, if they expressed Union sentiments, would be perilous; they could not remain there. Teachers of colored schools throughout the State give it as their opinion that they would be unable to remain there for a day but for the protection of the United States troops .... If it were not for the protection afforded by those troops the officers of the Freedmen's Bureau could not remain there .... There is nothing to fear for the future of the freedmen if the government, which has set them free, protects them, by standing between them and those who sought to destroy this nation and keep them in slavery ...."

Part II, p.223 (report of Freedmen's Bureau in South Carolina):

"Two freedmen were whipped by their master, who took them to the commanding officer at Barnwell .... This officer is reported to pay no attention to the complaints of freedmen. With such an officer in

power, it is hardly possible to protect them from abuse."

Part II, p.230 (Freedmen's Bureau Circular):

"[A]ll commissioners are required to protect those within their jurisdiction in the enjoyment of their rights."

Part II, p. 239 (Captain Ketchum):

"Q: Suppose the protection [freedmen] now enjoy from the presence of federal troops and from the Freedmen's Bureau should be withdrawn, and they should be exposed to the consequences of State legislation and to the prejudice and injustice which it is natural to suppose would be exercised toward them by whites; what, in your judgment, would be the result in the end?
A: I think, in the end, there would be a conflict.
Q: Could they do otherwise than arm themselves to defend their rights?
A: No, sir .... They could not do otherwise than organize to protect themselves."

Part II, p.269 (See C(3)(protection of property rights).

Part III, pp.5-6 (Major General Hatch):

"I do not believe the Union men could remain [in Mississippi] if there were no federal troops there to protect them. There is a great deal of private enmity and intense personal

dislike to them .... In the mountain region of Alabama there are a great many loyal people .... Between them and the people of the other portions of Alabama there is a great deal not only of animosity in regard to the question of secession, but of private animosity. The loyal men in that part of the State may be strong enough to protect themselves, as they have gone home with their arms."

Part III, p.15 (J.J. Gries):

"[T]he freedmen will have to be guarded for a while, and the Freedmen's Bureau will have to throw some protection around them."

Part III, p.17 (Mordecai Mobley):

"A: [A] planter ... drew back and struck the negro as hard a blow as he could with his fist, and then tried to kick him off the platform while the [railroad] car was in motion ....
Q: Did the white man offer to interfere and protect the negro or his property?
A: No, sir .... The truth of the matter is, the southern people don't care anything about it ...."

Part III, p.25 (Ezra Hienstadt):

"The first great requisite, that which I imagine would have the best influence in settling the state of things in Louisiana, would be to maintain there for some years a rigid administration of the Freedmen's bureau, to protect the blacks in

their rights .... I consider that such an establishment would stand as a barrier to the encroachments of one class upon the rights of another."

Part III, pp.31-32 (Major General Fisk):

"Q: What, in your opinion, would be the result of withdrawing the troops from Georgia, Alabama and Mississippi, and of suspending the operations of the Freedmen's Bureau?
A: I think it would be disastrous .... The freedmen would not remain there .... Unless the laborer is assured that he has a government agent set for his protection and defense, he would withdraw, and the condition of things would be too unpleasant for northern men of enterprise to live in that section of the country."

Part III, p.37 (see C(3)).

Part III, p.47 (Union army report concerning Georgia and Florida):

"In order adequately to protect the persons and property of freedmen ... the present number of [Freedmen's Bureau] agents should be increased .... [T]he troops should remain for the protection of northern immigrants.

Part III, pp.61-63 (Mailton Safford):

"There is no question that but for the protecting power of Congress [the southerners] would really or virtually reenslave the freedmen again .... I think norther men would prefer to

look to Congress than to the public sentiment of Alabama for protection."

Part III, p.101 (Major General Saxton):

"A: ... [T]he general impression among all northern men who have gone into business [in Georgia] is that they are persecuted simply because they are northern men and Union men. I think that among the great majority of the white population there, hatred to 'the Yankees', so called, is thorough and intense.
Q: If the military forces of the United States were to be withdrawn, what would be the condition of the avowed Union men and northern men there?
A: I think their position there would be such that it would be hardly possible for them to remain .... I do not think they would be allowed to express openly their Union sentiments without the protection of the United States troops."

Part III, p.133 (1865 amendment to Mississippi constitution):

"[T]he legislature ... shall provide by law for the protection and security of the person and property of the freedmen of this State."

Part III, p.147 (report of Freedmen's Bureau official concerning Mississippi):

"In view ... of the terribly vindictive passions ... controlling the minds of [the southern whites], permit me to respectfully recommend that troops be stationed in that

section of the country, or that the freedmen be protected in removing to some locality where their lives, at least, will be secure."

Part III, p.161 (Alexander Stephens):

"Q: ... [W]hat are the leading objects and desires of the negro population, at the present time, in reference to themselves?
A: It is to be protected in their rights of persons and property -- to be dealt by fairly and justly."

Part III, p.183 (Message of Governor of Mississippi):

"The negro is free, whether we like it or not; we must realize that fact now and forever. To be free, however, does not make him a citizen, or entitle him to social or political equality with the white man. But the constitution and justice do entitle him to protection and security in his person and property, both real and personal.

In my humble judgment, no person, bond or free, under any form of government, can be assured of protection or security in either person or property, except through an independent and enlightened judiciary. The courts, then should be open to the negro .... [W]hether for the protection of the person or the property of the freeman, or for the protection, of society, the negro should be allowed and required to testify."

Part III, p.185 (Georgia Constitution of 1865):

"It shall be the duty of the general assembly ... to provide by law for the government of the free persons of color; for the protection and security of their persons and property..."

Part IV, p.4 (John Recks):

"Q: What protection would there be [in Florida] for colored people if the troops were withdrawn entirely from the State?
A: In the only portion I have any knowledge of, there would be a sufficient number of colored people to thrash them out, with a good commander. Were there not a majority of them, their condition would be very bad."

Part IV, pp.10-11 (Rev. L.M. Hobbs):

"I hear them making their threats, and saying that if they could get the military taken away, 'there would be plenty of dead niggers lying around in the woods' .... [T]he negroes would be shot down like sheep .... If the [Freedmen's] bureau is withdrawn there will be no safety for the freedmen at all; he will not be safe unless there is some protection of that kind for him .... The freedmen must be protected, or else giving him his freedom will be but a farce. The Freemen's Bureau will not be expensive if it is known it is to be kept there and will be used for the

protection of the negro in his just rights."

Part IV, p.45 (Lt. Miller):

> "[T]he Freedmen's Bureau ... is necessary ... as a protection to the freedmen against imposition on the part of their employers, whether southern or northern men .... Without some such institution as the Freedmen's Bureau, to protect the freedmen in his rights, his chance for justice with either party would be very small .... Without the presence of the Freedmen's Bureau, and an armed force to back it, I do not think the life of a freedman coming in the way of one of the disbanded rebel soldiers ... would be worth a cent."

Part IV, p.46 (Lt. Col. Hall):

"Q: What would be the state of the country in which you have been, should the military force ... and the officers of the Freedmen's Bureau be ... withdrawn?

A: ... I would say there would be neither safety of person nor of property for men who had been loyal during the war; and there would be no protection whatever for the negro .... He would be liable to worse treatment than ever before -- to assaults in many instances, and even to murder."

Part IV, p.60 (D.E. Haynes):

"Q: State whether, in your opinion, it is now safe for Union men in Louisiana without the military protection of the government.

A: It is not safe."

Part IV, p.68 (Rev. Joseph Roy):

> "I found the [Freedman's Bureau officials] everywhere seeking to promote the physical comfort of the negroes, and to secure their protection from violence .... [M]any citizens who were not distinguished for their loyalty, also said that the bureau was a necessity for the protection of white people."

Part IV, pp.72-76 (Major General George Custer):

"Q: What would be the condition of the loyal men in Texas now, in case the military protection now afforded were withdrawn from the State?

A: I would not consider it safe for a loyal man to remain in Texas. ... [T]he freedmen ... realize, as all Union men in the State do, that their only safety and protection lies in the general government; and they realize, too, that if the troops are withdrawn, they will be still more exposed than they are now."

Part IV, pp.80-83(Thomas Conway):

> "I think that Union men in [Louisiana] would not be safe in their property or in their persons

without the aid of the military. The negroes, without military aid, or without the aid of the government, would not be able to secure their wages; no justice would be shown them, and they would be murdered .... [T]he negro race would be exterminated unless protected by the strong arm of the government."

APPENDIX C(2)

(2) References to Abuses of Union Loyalists, Northerners, and Other Whites

Part I, p. 114 (see C(1)) (southern loyalists).

Part I, p. 119 (see C(1)) (former Union soldiers).

Part II, pp. 34 (Major General Turner):

> "Union men who have lived in Virginia all their lives tell me they will have to leave as soon as our troops are withdrawn.... These people are now persecuted to death, one might say, by the rebels."

Part II, p. 7 (see C(1) and C(3)) (union man, northerners).

Part II, pp. 16-17 (George Smith):

"Q: How do [the people of Virginia] feel generally towards the freedmen?

A: Hatred. Their hate, first, is to the citizen Union men; their next hate is to the negro; their last is to the Yankees, as they call them.

Q: If left to themselves, what would they do with the negro?

A: They would entirely extirpate him from the face of the earth. They would first commence with the Union men, and then they would take the negro.... It is ... the Union men who has lived among them and taken an active part against them whose life is in jeopardy.

Part II, p. 18 (Dr. G. F. Watson):

"[The people of Virginia] despise ... and will handle roughly ... Union white men."

Part II, p. 23 (see C(1), C(3)) (southern loyalists, northerners).

Part II, p. 29 C(1), C(3)) (southern loyalists).

Part II, p. 32 (see C(1), (3)) (southern loyalists, northerners).

Part II, pp. 33-35 (see C(1), C(3)) (southern loyalists).

Part II, p. 40 (See C(1)) (union men).

Part II, p. 43 (Watkins James):

"A few days ago an anonymous letter was dropped in the post office, notifying the teacher of the freedmen's school that he must leave or take the consequences. About the same time ... two United States detectives were run from New Market. A man named Lamberson ... was shot twice.... This man's offence is, he served in the Union army. The Union

men feel there is great danger. About the same time a teacher of freedmen ... was called on some time in the night by fifteen or twenty persons ... taken to the Shenandoah river ... and held under water some time ... and then threatened, if he did not leave the county in three days, he would be shot dead."

Part II, p. 47 (see C(1)) (union men).

Part II, p. 10 (E. V. Dunning):

"Q. ... [D]o [the rebel people] appear to hate the north as a community?

A: Yes, sir; decidedly.

Q: In case of the removal of the military forces of the United States from these communities, is it likely, in your mind, that there would be scores of violence and riot?

A: I have no doubt of it.

Q: What would be the special object of such violence?

A: I think it would manifest itself against Union citizens and against colored people."

Part II, pp. 49-50 (see C(1)) (loyal whites).

Part II, p. 61 (D. B. White):

"The person who is now deputy sheriff of Elizabeth City county ... expressed his wish to ... drive out

of that part of the country every Union man, whether of the south or of the north."

Part II, p. 63 (D. B. White):

"Q: In case a northern man should purchase real estate among [the secessionists], would he be safe in the enjoyment of his property?

A: I think he would not."

Part II, p. 111 (see C(3)).

Part II, p. 125 (Colonel Brown):

"Q: How are northern men treated in Virginia?

A: Northern men are treated better than Union Virginians. I do not think they would be well treated if the troops were withdrawn."

Part II, p. 141 (See C(3)) (Union men).

Part II, p. 143 (see C(1)) (loyal people).

Part II, p. 153 (Frederick Bruce):

"[I]f the troops were withdrawn from the city [of Lynchburg] no man connected with the United States government would be safe in walking in the streets after dark."

Part II, p. 201 (Homer Cooke):

"Q: Suppose the military forces should be removed entirely from North Carolina?

A: I think the northern people would be compelled to go with them or very soon after....

Q: In such an event would you apprehend violence towards northern men on the part of secessionists?

A: ... [T]o a greater or less extent, either by destruction of their property or by some other means."

Part II, p. 207 (see C(1)) (loyal men).

Part II, p. 208 (see C(1)) (northern men).

Part II. p. 214 (J. A. Campbell):

"I think that if the United States troops were withdrawn from North Carolina the property of loyal men and the persons of freedmen would not be safe."

Part II, p. 218-21 (see C(1) and C(3)) (unionists, teachers in schools for freedmen, agents of the Freedmen's Bureau).

Part II, p. 244 (see C(3)) (northerners).

Part III, p. 3 (Albert Kelsey):

"I know the general feeling among northern men [in Georgia] is that they are not safe; that they are liable not only to be robbed, but to be killed at any moment."

Part III, pp. 5-6 (see C(1))

Part III, pp. 6-7 (Major General Hatch):

"Q: How would it be in Georgia with northern men who might go out there to live?....
A: I do not think tney can live there after our troops shall have been taken away.
Q: How would it be with Union men who are natives of the country, should our troops be taken away?
A: They would suffer more than the northern men.... The feeling towards them is more bitter than towards northern men."

Part III, p. 14 (see C(3))

Part III, P. 24 (Ezra Hienstadt):
"Q: Would it or not, in your judgment, be safe for the loyal people of Louisiana, both white and black, to withdraw from that State at this time the military power and supervision of the federal government?

A: I unhesitatingly say that I do not consider it would be safe for them to do so. My opinion is, that if the entire force of the federal government were withdrawn from the State of Louisiana the Union men, as we call those who were loyal during the rebellion, would be driven from almost all the rural portions of the State at least...."

Part III, p. 27 (see C(3)).

Part III, pp. 30-31 (See C(1)).

Part III, p. 70 (Brigadier General Brisbin):

"Q: What would be the effect of withdrawing the national troops from [Arkansas]?

A: I think it would lead to the expulsion of Union men, and especially of northern men who might desire to go there and settle."

Part III, p. 10 (see C(1))

Part IV, p. 2 (John Recks):

"Q: Do you think the presence of a military force in Florida is or is not necessary to secure the rights of property and the lives of citizens, white or black?

A: I do ... I think ... that if they had the power, they would use it to destroy Union men."

Part IV, p. 8 (Rev. L.M. Hobbs):

"Q: What would be the condition of the Union men [in Florida] should the military be withdrawn?

A: It would be intolerable; they could not remain there in safety; they would be compelled to leave the State. Northern men, especially those who have been in the United States service, could not live there at all.... [T]here is a class of boys ... who would put a bowie-knife or a bullet through a northern man as

soon as they would through a mad dog."

APPENDIX C(3)

(3) References to Unwillingness of States to Protect Lives, Liberty and Property

Part II, p. 4 (See C(1)) (freedmen).

Part II, p. 7 (Judge John Underwood):

"A: I do not believe, from what I have seen, that a Union man could expect to obtain justice in the courts of [Virginia] at this time, certainly not if his opponent was a rebel. The bitterness of feeling is very great, and I think the jury would be at least nine-tenths rebel, and the influence of the court would be the same....

Q: Would these prejudices against a Union man, and particularly a northern man, operate so far with a Virginia jury as to lead them to deny him ordinary justice in a matter of private right?

A: I think they might."

Part II, p. 17 (George Smith):

"Q: What chance does the negro stand to obtain justice in the civil courts of Virginia?

A: Not a particle -- no more than a rabbit would in a den of lions; nor a Union man, either."

Part II, p. 18 (G.F. Watson):

"A: ... There is one ... thing of which I feel fully satisfied; that is, that the loyal men of [Virginia] cannot

get justice in the reconstructed disloyal courts.
Q: Why not?
A: For the reason of the disloyalty of the jurors and lawyers."

Part II, pp. 23-25 (George Tucker):

"The Freedmen before any [Virginia] juries stands no chance of obtaining his rights, although he will stand as good a chance as a Yankee will, or as a native-born citizen of Virginia who has been a loyal man. The latter even stand a worse chance. "... [W]hites have not any idea of prosecuting white men for offenses against the colored people; they do not appreciate the idea."

Part II, p. 29 (Josiah Millard):

"Q: Suppose you should be murdered by an ex-rebel out of revenge and from dislike to you as a Union man, and suppose your murderer should be indicted and prosecuted in the proper court the district, and a jury should be called under the existing laws of Virginia, have you not grounds to suppose that, in case the evidence was plain and clear, the jury would convict that man?
A: That would depend upon the circumstances very materially. If the case was very plain and clear, and there was no possible chance to cover it up, the jury might bring in a verdict of guilty, but it would be very pressing circumstances that would compel them to do it. [I]f there was no possible chance to avoid

it. I have seen cases tried ... which, to me, were as plain as the sun that shines, and the verdict was entered quite the reverse.
Q: And that you suppose, is owing to the prejudice felt generally by rebels against Union men?
A: Yes."

Part II, p. 32 (Joseph Stiles):

"Q: What chance does a Union or a northern man stand in [Virginia] State courts?
A: No chance at all.
Q: Why not?
A: The popular feeling is against him altogether.... [T]here is no show for justice to Union men in any case that affects rebels.
Q: What chance does a freedman stand for justice at their hands?
A: As a general thing, he does not stand any chance for justice at all."

Part II, p. 33 (Jonathan Roberts):

"Q: How much chance is there for a Union man in the courts of [Fairfax County, Virginia] who should be a party against a rebel in a suit?
A: None; not so far as justice goes .... [W]hen we come to a jury, we have to take the masses as they come, and there is no chance at all for justice....

[T]here was a case tried of a returned rebel who shot a Union man at Falls Church.... The evidence was just as plain and positive as it could be -- indeed, the facts were admitted; and yet the jury brought in

a verdict of manslaughter, with one year's imprisonment. Nine of them went for acquitting him entirely; but the three Union men would not agree to it, and finally they compromised with one year's imprisonment. If it had been the other way, or if a rebel had killed a rebel, there would have been no doubt at all about his conviction."

Part II, p. 38 (J. J. Henshaw):

"Q: Would you not feel pretty safe in any of the civil courts of Virginia--you, a Union man; would you not expect impartial justice from a court and jury if you were an accused person in the court, or were suing there for redress of any of your wrongs?
A: I do not believe that you could get an impartial jury hardly in our county to try a case between an avowed Union man and an avowed secessionist."

Part II, p. 50 (Calvin Pepper):

"Q: How much chance does a northern Unionist stand in a State court in Virginia in the prosecution of his rights?
A: A very poor chance.
Q: In an ordinary suit between a loyalist, whether northerner or southerner, and a rebel, would you expect that justice would be fairly administered by a State court and a jury in Virginia.
A: As a general rule, I do not.... Within the last six months I have had

more than a hundred complaints made to me with reference to the abuse of freedmen by the rebels, or at their instigation. They have been beaten, wounded, and in some instances killed; and I have not yet known one white man to have been brought to justice for an outrage upon a colored man."

Part II, p. 63 (D. B. White):

"Q: What chance has a northern man or a Unionist for justice in the State courts of Virginia?
A: He has not any chance at all.- I would not go before one of those courts, if I could avoid it, under any circumstances, because there is no justice there at all.
Q: When you say there is no chance, do you mean to say that the bias and ill-feeling on the part of court and jury are so great against the Unionists north and south that they would not be able to obtain their rights?
A: Yes, sir. The bias is so great that they could not even entertain a hope of getting justice according to their interpretation of their own State laws."

Part II, p. 97 (Lieutenant W. L. Chase):

"Q: Are not the civil rights of the people protected there in the State courts?
A: I do not think a loyal man could get his rights in the courts, there is such a prejudice against refugees and against the northern men.

Q: Do you think that prejudice would affect the mind of the court and jury?
A: Yes, sir; I think it would."

Part II, p. 111 (William Dews):

"Q: What chance does a Unionist stand to get justice in the State courts?
A: I should not suppose, with perhaps a few exceptions, that he would have any chance; that is the impression of all the Union mean.... [T]hey are convinced that they cannot have justice done them on account of the prejudice against them."

Part II, p. 127 (Colonel Brown):

"Q: Would the negro stand any chance of obtaining justice in the courts?
A: I have the assurance of one of the first lawyers in the city of Richmond that his opinion is that the negroes could not obtain justice before a Virginia jury.
Q: Justice to the negro and justice to the white man are different articles, I suppose; it changes with the complexion?
A: Yes, sir."

Part II, p. 141 (General Terry):

"Q: Are Unionists secure in the enjoyment of their rights in the midst of a secession community there?
A: I do not think they are.
Q: Can they safely rely on the State courts for justice to themselves and for protection of their rights?
A: No, sir. I think not.

Q: How would it be, for instance, in a suit between a strong Union man, whether residing there or from a loyal State, and a secessionist. Would you apprehend that a jury, called in the regular way in Virginia would be prejudiced against a Union man?
A: ... [S]uch is my impression in regard to the feelings of secessionists towards Union men that I think that the rights of the latter, under these circumstances, would not be secured."

Part II, p.143 (see C(1)).

Part II, p. 149 (Manasseh Blackburn):

"Q: What chance does a black man or a Unionist stand in the State courts for justice and the protection of his rights?
A: I would doubt whether a Unionist can get justice. He might in some pecuniary matters get justice, but I doubt whether in other things he could. I think that, as far as the blacks are concerned in the valley, they would in pecuniary matters get justice -- they could collect bills, or anything of that kind."

Part II, p. 150 (Rev. Hunnicutt):

"Q: Do you think that Union men, whether from the north or residents in the neighborhood, are secure in the civil courts of justice of the State?
A: I do not believe that any of us will get justice done.... [T]he testimony of negroes will not be worth a snap of your fingers.... [T]here are the

judges, the lawyers, and the jury against the negro, and perhaps every one of them is sniggering and laughing while the negro is giving his testimony."

Part II, p. 153 (Frederick Bruce):

"Q: How much chance does a Union man stand in that region for obtaining justice in the courts of the State?
A: My honest impression is that a leading Union man -- one who had made himself notorious or conspicuous as such, as against a southern man who had been in the rebellion -- would not have an equal show in the courts of justice.... [T]here are men there who would not under any circumstances do justice to a Union man in a controversy between him and a secessionist."

Part II, p. 169 (Rev. James Sinclair):

"Q: Under the present laws, and with the present courts in North Carolina, how much security is there for commercial men of the north in the transaction of their business?
A: I reckon they would have no security at all just now....
Q: Take the case of a northern man who is a suitor before the courts for his rights, with a case that is to be tried before a jury; would he stand a fair chance against his opponent should his opponent be a rebel?
A: No chance at all for a citizen of the State, in my opinion, if he is obnoxious to the people politically."

Part II, p. 175 (Lt. Sandeson):

"[If the union forces were withdrawn] the freedmen ... would have no chance in court ... he could not enforce contracts if he made them, and no jury that could be impanelled would give a verdict in his favor."

Part II, p. 209 (Dexter Clapp):

"A: ... of the thousand cases of murder, robbery and maltreatment of freedmen that came before me, and of the very many cases of similar treatment of Union citizens in North Carolina, I have never yet known a single case in which the local authorities or police or citizens made any attempt or exhibited any inclination to redress any of these wrongs or to protect such persons ....
Q: Do you suppose that the omission on the part of the authorities to interfere and enforce justice arises from their own fears of the ruffians, or from their sympathies with the ruffianism?
A: I think it comes from both causes....
Q: How did Governor Holden demean himself towards such outrages; did he make any efforts as governor of the State to punish them?
A: I know of no such efforts that he has made.... I have known of several instances in which outrages were committed, and in which he exerted his influence with the military authorities to have them passed over."

Part II, p. 215 (J. A. Campbell):

"Q: Are the rights of Unionists from the north and south safe in the Sate courts of North Carolina?
A: ... I do not think they would be. If I had any property I would not trust it before the courts there as against a rebel.
Q: ... Would a unionist be likely to receive an impartial verdict at the hands of a North Carolina jury?
A: I do not think he would."

Part II, p. 218 (General Saxton):

"Q: What chance do Unionists, especially Unionists from the north, stand for <u>protection</u> and security in the State courts of South Carolina?
A: ... It is my opinion they would stand a very poor chance. ... Northern men would probably fare just as bad in the courts as freedmen, and it is my belief that there are large numbers in South Carolina who would consider it no greater crime to kill an agent of the Freedmen's Bureau than to kill a negro."

Part II, p. 225 (Report of Freedmen's Bureau in South Carolina):

"It is stated that the superior provost court here is outrageously unjust towards freedmen and northern whites whenever they are opposed by secessionists. That the court being violently secession in sentiment, while allowing negro testimony gives it no weight whatever if white witnesses appear on the other side. A case is reported where a horse in the possession of a freedman was

taken from him and given to a late rebel soldier, the cost of court, ten dollars ... being adjudged against the freedman, although the freedman brought full proof that the horse came into his possession a longtime previous to the date given by the soldier as the time he lost him."

Part II, p. 244 (J. V. Alvord):

"Q: Do you regard it as safe, as a general rule, for northern men to go down [south] and attempt to settle and become residents?
A: It would not be for those who favored the government and the interests of the freedmen, if the military were withdrawn; it would be very unsafe.
Q: Would such settlers probably be subjected to violence and insult?
A: To all sorts of insult, and probably to violence in very many cases.
Q: Would they not be able to obtain justice in the southern courts if they were thus treated?
A: They would probably obtain a hearing, but I think they would hardly secure justice.
Q: Why not?
A: From the strength of southern prejudice against northern people.
Q: You think that prejudice would pervade seen the juries who would be called to try the case?
A: I think it would.
Q: Do you think it would generally affect the decisions of the judges upon the bench?
A: I should fear it might. I learned of cases where the court was very partial to the old class of

southerners who came into litigation with northern-born men or negroes."

Part II, p. 269 (Lt. Colonel Beadle):

"Q: By the laws of North Carolina, would a free black man be allowed to own land?
A: They have been, and some now do, ... but their protection is very uncertain, and I have had cases where colored persons had great difficulty in retaining the property. It had passed into hands of agents, lessees, and others; and the colored man once losing possession, has great difficulty in obtaining redress from a civil court....
Q: Have you discovered such a prejudice against the black man in North Carolina as would restrict his rights in the State courts?
A: Yes, sir....
Q: In your judgment, does that prejudice infect the judges themselves; or is it confined to the juries?
A: There is hardly a southern man ... but is prejudiced against allowing a colored man equal civil rights, equality before the courts, in fact (though they may do it in form)."

Part III, p.14 (J.J. Gries):

"Q: What would be the condition of the loyal men of Alabama ... should the Union troops be withdrawn?
A: They could not live there at all. I have been driven from my home for three years .... When I returned they took by civil law all the corn raised on my place .... They took it by

false testimony. ... Every judge in our State is a rebel .... We could fill a book with facts of wrongs done to our people there ... A great many ... were robbed by friend and foe almost."

Part II, p.27 (Major General Thomas):

"Q: If the national troops and the Freedman's Bureau were removed from Alabama, what results would you anticipate in regard to freedmen?
A: If that were done at this time, I do not believe that the freedmen or that Union men could have justice done them.
Q: What form would the injustice be likely to take?
A: It would commence with suits in the courts for petty offenses, and neighborhood combinations to annoy them so much ... that they could not live there in any peace and comfort."

Part III, p.37 (Brigadier General Howard):

"Q: Suppose the shield of legal protection should be thrown around [the] domestic relations [of freedmen], would that protection be respected by the whites in South Carolina practically?
A: If it were mere law, I should apprehend that it would be entirely inadequate in the present state of public sentiment. In fact, I may say generally that laws may be made impartially in South Carolina, but with the existing public sentiment they would not be sufficient for the

protection of the negroes in their rights.

Q: Suppose a white man should dishonor a black husband, by having illicit intercourse with his wife, obtained either by violence or seduction, would the black husband, in a South Carolina court, have much prospect of obtaining redress?

A: I think not.

Q: Would a white jury give him damages?

A: I think not, sir .... I feel certain that he could not get adequate redress. They might award him something as a cover, for the appearance of the thing ...

Q: Suppose a black man should bring suit in a State court there for the redress of any other wrong to his person or property, would he be likely to obtain adequate redress.

A: I believe not ..."

Part III, p.47 (Union army report concerning Georgia and Florida):

> "Public sentiment is such that even should the laws be made impartial, the negro could not obtain redress for wrong done him in person or property."

Part III, p.184 (report of Freedmen's Bureau concerning Mississippi):

> "The negroes of this section have remained on their former plantations since the surrender; but when the crops were gathered many were driven away by threats or abuse, and all law that protects the freemen and insures compensation to the laborer has been

withheld from them. They are absolutely without law. The codes of Mississippi direct that in order to prosecute a claim, or bring suit against any party, the plaintiff must give security for the cost, should the case be decided against him -- a condition that, perhaps out of the entire population of the blacks in the State, not one in a hundred would be able to comply with, while the remaining ninety and nine are left to the caprice of the capitalist."

Part IV, pp. 60 (D.E. Haynes):

> "[Several former rebels] beat me violently .... The occasion was that I had been in the Union army.... I ... went to Alexandria, and while there endeavored to employ a lawyer .... He would not take the case ... I found that the reason why he would not take the case was that he would lose caste in that community by allowing himself to be employed by a Union man. My intention was to prosecute these rebels, two of whom had shot me, and others had committed a violent assault and battery upon my person, and still others had robbed my wife.... [A]ll those I consulted told me it was no use to sue for damages; that no Union man could get damages...."

Part IV, p. 75 (Major General George Custer):

> "[T]he great mass of the people [in Texas] seem to look upon the freedmen as being connected with, or as being

the cause of, their present condition, and they do not hesitate to improve every opportunity to inflict injuries upon him in order, seemingly, to punish him for this. This feeling exists to a certain extent, and is often manifested in their courts.... [S]ince the establishment of the provisional government in Texas the grand juries throughout the State have found upwards of five hundred indictments for murder against disloyal men, and yet in not a single case has there been a conviction, while in one judicial district ... the judge ... stated that fourteen negroes had been tried within his jurisdiction for various slight offenses; that the fourteen had all been convicted and sentenced to various terms in the State prison. And to show you the manner in which justice is meted out in their courts towards the freedmen, one was tried and convicted of stealing one bushel of sweet potatoes, and sentenced to the penitentiary for two years. ... [I]t is of weekly, if not of daily, occurrence that freedmen are murdered.... [S]ometimes it is not known who the perpetrators are; but when that is known no action is taken against them. I believe a white man has never been hung for murder in Texas, although it is the law."

Part IV, p. 89 (John T. Allen):

"If it be left entirely to the verdict of a jury, as in cases between white man and white man, it

will be found that jurors ... cannot entirely rid themselves of their old prejudices. ... I have seen men who were just as good jurymen as I would wish to have in a jury box in ordinary cases pay no attention to, but utterly disregard, the evidence in a case where a white man and a black man were concerned."

Part IV, p. 153 (T. J. Mackey):

"Q: In the rural districts of Texas are the lives and property of freedmen secure as against the prejudices and feelings of the people?
A: They are not; they are very far from being secure.
Q: Have you heard of many homicides being committed upon the freedmen.
A: Yes, sir; of many.
Q: And do the State authorities interfere in those cases?
A: Wherever the case is brought to the attention of the civil authorities, action is taken so far as to issue writs of arrest; but it is almost, if not quite, impossible to secure the necessary testimony to convict parties.... [I]n Louisiana ... the prevailing sentiment is so adverse to the negro that acts of monstrous crime against him are winked at."

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No. 88-305

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA,
Petitioner,

-v.-

DEMETRIUS GATHERS,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF OF THE SOUTH CAROLINA PUBLIC DEFENDERS' ASSOCIATION AND THE SOUTH CAROLINA DEATH PENALTY RESOURCE CENTER AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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MOTION BY THE SOUTH CAROLINA PUBLIC DEFENDERS' ASSOCIATION AND THE SOUTH CAROLINA DEATH PENALTY RESOURCE CENTER AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Pursuant to Supreme Court Rule 36.3, the South Carolina Public Defenders' Association and the South Carolina Death Penalty Resource Center move for leave to file the brief submitted herewith as

amici curiae. Counsel for the Respondent has consented to the filing of the brief, but counsel for petitioner would not give timely consent.

The South Carolina Public Defenders' Association, Inc., is a nonprofit organization consisting of public defenders and assistant public defenders from the each of South Carolina's sixteen judicial circuits. Among the Association's objectives is to improve the quality of criminal defense representation for indigent persons in South Carolina, including cases in which the state seeks the death penalty. Furthermore, the attorneys who comprise the membership of the Public Defenders' Association are involved in almost every capital trial in South Carolina. S.C. Code Sec. 16-3-26(A) (1988 Cum. Supp).

The South Carolina Death Penalty Resource Center was created by the South Carolina Bar for the purpose of assisting appointed counsel in the representation of indigent death-sentenced prisoners. The primary goal of the Resource Center is to improve defense representation in capital cases by offering expert support, legal guidance and technical assistance to court-appointed counsel. The Resource Center provides such assistance to attorneys appointed at all stages of the capital sentencing and appellate process, from trial through federal habeas corpus review. The Resource Center legal staff also serves directly as counsel of record in fourteen capital cases now pending in the South Carolina state and federal courts.

Because the membership of the South Carolina Public Defenders' Association and the staff of the South Carolina Death Penalty Resource Center are involved, to one degree or another, in almost every capital case in South Carolina, amici believe that they have a broad perspective on the questions presented in this case which would be beneficial to this Court. Furthermore, due to their extensive involvement in providing representation to persons against whom the state seeks the death penalty, amici have a special interest in helping to ensure that the capital sentencing process remains reasonably rational, predictable and fair. This case will decide whether the lives of convicted offenders may be condemned or spared on the basis of irrelevant, misleading and

unrebuttable "facts" concerning the purported religious and civic attributes of their victims. Because the answer to this question may determine whether capital sentencing proceedings will remain focused on the offender and his crime, or whether their focus will shift to a confusing and bitter courtroom battle over the value of the murder victim's life, the present case implicates many of the most fundamental concerns of the amici organizations.

For all these reasons, the South Carolina Public Defenders' Association and the South Carolina Death Penalty Resource Center believe that the filing of this amici curiae brief is desirable because it presents to the Court significant information about the context in which this case has arisen. The brief

is an amici curiae brief in the truest sense. It provides the Court with a unique perspective which differs from those of the parties and will substantially assist this Court by providing it with a different and important perspective from which to evaluate the facts of this case. With that perspective, the Court will be in a better position to evaluate the particular facts about South Carolina and the detailed legal arguments which the parties are presenting in their briefs.

Accordingly, the South Carolina Public Defenders' Association and the South Carolina Death Penalty Resource Center respectfully request the Court to grant this motion for leave to file a brief as

amici curiae.

Respectfully submitted,

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January 31, 1989

QUESTIONS PRESENTED

I.

Whether a murder victim's purported religious faith and good citizenship provide a constitutionally permissible basis upon which to sentence his murderer to death.

II.

Whether the prosecutor violated respondent's due process rights by offering the victim's purported good qualities as reasons to impose a death sentence, under circumstances in which the defendant was prevented by state law from presenting countering evidence and argument.

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U.S. Const. art. III 17

STATEMENT OF INTEREST OF AMICI CURIAE

The South Carolina Public Defenders' Association, Inc., is a nonprofit organization consisting of public defenders and assistant public defenders from the each of South Carolina's sixteen judicial circuits. Among the Association's objectives is to improve the quality of criminal defense representation for indigent persons in South Carolina, including cases in which the state seeks the death penalty. Furthermore, the attorneys who comprise the membership of the Public Defenders' Association are involved in almost every capital trial in South Carolina. S.C. Code Sec. 16-3-26(A) (1988 Cum. Supp).

The South Carolina Death Penalty Resource Center was created by the South Carolina Bar for the purpose of assisting

appointed counsel in the representation of indigent death-sentenced prisoners. The primary goal of the Resource Center is to improve defense representation in capital cases by offering expert support, legal guidance and technical assistance to court-appointed counsel. The Resource Center provides such assistance to attorneys appointed at all stages of the capital sentencing and appellate process, from trial through federal habeas corpus review. The Resource Center legal staff also serves directly as counsel of record in fourteen capital cases now pending in the South Carolina state and federal courts.

Because the membership of the South Carolina Public Defenders' Association and the staff of the South Carolina Death Penalty Resource Center are involved, to

one degree or another, in almost every capital case in South Carolina, amici believe that they have a broad perspective on the questions presented in this case which would be beneficial to this Court. Furthermore, due to their extensive involvement in providing representation to persons against whom the state seeks the death penalty, amici have a special interest in helping to ensure that the capital sentencing process remains reasonably rational, predictable and fair. This case will decide whether the lives of convicted offenders may be condemned or spared on the basis of irrelevant, misleading and unrebuttable "facts" concerning the purported religious and civic attributes of their victims. Because the answer to this question may determine whether

capital sentencing proceedings will remain focused on the offender and his crime, or whether their focus will shift to a confusing and bitter courtroom battle over the value of the murder victim's life, the present case implicates many of the most fundamental concerns of the amici organizations.

BRIEF OF AMICI CURIAE SOUTH CAROLINA PUBLIC DEFENDERS' ASSOCIATION AND SOUTH CAROLINA DEATH RESOURCE CENTER

OPINIONS BELOW

The opinion of the South Carolina Supreme Court affirming respondent's convictions, reversing his death sentence, and remanding for a new sentencing proceeding was filed on June 6, 1988, and is reported as State v. Gathers, 295 S.C. 476, 369 S.E.2d 140 (1988).

STATEMENT OF JURISDICTION

The Attorney General of the State of South Carolina filed a timely petition for writ of certiorari requesting that this Court review the judgment of the South Carolina Supreme Court. Certiorari was granted on October 11, 1988. The jurisdiction of this Court rests upon 28

U.S.C. §1257(3) and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution which states, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF FACTS

Respondent Demetrius Gathers was convicted of participating in the murder of a man whom he and several associates encountered in a Charleston, S.C.

municipal park. The victim, Richard Haynes, was an unemployed 31-year-old former mental patient who affected the title of "Reverend Minister Haynes." The state's evidence at the guilt-or-innocence phase of respondent's trial showed that Haynes, who passed his days as an itinerant street preacher, went to the park on the evening of the murder carrying a bag containing several Bibles, a plastic angel, a sheet, some personal papers and a bottle of olive oil which he used to anoint people. At the park, he was robbed and fatally assaulted by respondent and several other persons. Police officers found Haynes's rifled bag and its contents at the scene of the murder, and during the guilt-or-innocence phase of respondent's bifurcated murder trial these items were offered as

evidence by the prosecution and admitted without defense objection.

The issue before this Court arose when, at the sentencing hearing which followed petitioner's conviction for murder, the prosecutor extracted from Haynes' personal effects a printed prayer and a voter registration card, and used these exhibits as the evidentiary basis for the following argument to the jury:

Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had this religious items, [sic] his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person. Cared little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks.

But look at Reverend Minister Haynes' prayer. It's called the Game Guy's Prayer.

"Dear God, help me to be

a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask for the stuff to give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me to always play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other

guys who are out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life."

Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune. And he took things as they came along. He was prepared to deal with tragedies that he came across in his life.

And there has been some talk about this being a tragedy. Well let's get one thing straight. This isn't a tragedy. Tragedy is a birth

defect, something over which we have no control. This is an atrocity. This was a willful, premeditated act of this defendant, who is [sic] Charleston County, on our shores, in this country, took with the most eager pleasure the life of another in the most gruesome, hard to describe and hard to believe circumstances. The appropriate punishment in this case is death.

You will find some other exhibits in this case that tell you more about a just verdict. Again this is not easy. No one takes any pleasure from it, but the proof cries out from the grave in this case. Among the personal effects that this defendant could care little about when he went through it is something that we all treasure. Speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card.

Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers. Weigh the aggravating circumstances in this case. Look at it very carefully. Calmly, rationally.

The trial jury sentenced respondent to death.[1] On appeal to the South Carolina Supreme Court, respondent alleged, inter alia, that his sentence should be reversed because the prosecutor had improperly injected the alleged good

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[1]Defense counsel did not attempt to meet or rebut the state's argument. However, in light of established South Carolina law, this is not surprising. In State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132, cert. denied, 471 U.S. 1120 (1985), decided several years before the trial of this case, the South Carolina Supreme Court held that a capital defendant may not introduce evidence regarding the bad character of the victim in mitigation of punishment. See also State v. Bell, 293 S.C. 391, 402, 360 S.E.2d 706 (1987), cert. denied, 108 S.Ct. 734 (1988) (recognizing that Gaskins precludes admission of evidence regarding victim's bad character). Because of Gaskins and other decisions of the South Carolina Supreme Court, respondent had no notice and could not have anticipated that the prosecution would argue that the victim's Christianity and good citizenship were reasons that Gathers should be sentenced to death.

character of the murder victim as a sentencing consideration. The South Carolina Supreme Court accepted this contention, holding that the comments violated this Court's intervening decision in Booth v. Maryland, 482 U.S.___, 107 S.Ct. 2529 (1987). The state supreme court concluded:

> The solicitor's extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime. Cf. State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987). These remarks conveyed the suggestion that appellant deserved a death sentence because the victim was a religious man and a registered voter. Because the solicitor's remarks violated appellant's eighth amendment rights, we reverse the death sentence. Accord State v. Gaskins, [284 S.C. 105, 326 S.E.2d 132, cert. denied, 471 U.S. 1120 (1985)] (evidence of victim's bad character not admissible as mitigating evidence in sentencing phase).

295 S.C. at 484; 369 S.E. 2d at 144; J.A. at 66.

The Attorney General did not file a petition for rehearing in the South Carolina Supreme Court, nor did it move to stay the remittitur returning jurisdiction to the trial court. Some six weeks after the remittitur was duly sent down from the South Carolina Supreme Court, divesting that Court of all further jurisdiction in this case, the state filed a petition for writ of certiorari in this Court.[2] In the

[2]Before proceeding to the merits of the state's constitutional arguments, it should be noted that the failure of the petitioner state of South Carolina to request that the South Carolina Supreme Court stay the remittitur, as required by Rule 17 of that court's rules, effectively removes the power of this Court to affect the judgment now under review. On June 17, 1988, counsel for both parties were advised that the remittitur in this case had been sent to the Clerk of Court for Charleston County. The Attorney General of South Carolina did not file its petition for writ of certiorari until August 5, 1988, two months after the decision of the South Carolina Supreme Court and six weeks

after the remittitur had been sent down to the Charleston County Clerk of Court. Therefore, while this Court may have jurisdiction to review the decision of the South Carolina Supreme Court, any decision rendered in this case would be merely advisory. This is so for the following reasons.

South Carolina law is settled that once the remittitur has issued, the state supreme court is without power to alter, amend, or clarify its previous decision. See, e.g., Mickle v. Blackmon, 255 S.C. 136, 177 S.E.2d 548, 549 (1970) (after remittitur has issued state supreme court has no jurisdiction); see also Thomas v. Lynch, 87 S.C. 44, 68 S.E.2d 817 (1910) ("when the remittitur has been properly sent to the Court below, the Supreme Court loses jurisdiction, and thereafter neither the Court, nor any justice thereof, can make any order in the case"); State v. Adams, 83 S.C. 149, 65 S.E. 220 (1909) ("this Court has held that its control of the judgment ends when the remittitur has been sent down") Mayes v. Evans, 80 S.C. 362, 61 S.E. 657 (1908) ("the remittitur having been sent down, this court has no jurisdiction"). In fact, the South Carolina Supreme Court lacks even the power to entertain a motion to recall the remittitur after the remittitur has been sent to the trial court. Carpenter v. Lewis, 43 S.E. 881, 65 S.C. 400 (1902); McKenzie v. Sifford, 52 S.C. 394, 29 S.E. 811 (1898); State v. Merriman, 35 S.C. 607, 14 S.E. 394, 395 (1892). Thus because no motion to stay the remittitur was filed by petitioner

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and because the remittitur has been sent down and has been properly filed in Charleston County, the state supreme court is without power to recall the remittitur, or to modify its previous decision in any other way.

The failure of the petitioner Attorney General to comply with established state procedure to stay the remittitur pending the filing and disposition of the petition for certiorari renders any decision that this Court might ultimately render merely advisory. See generally Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977); Henry v. Mississippi, 379 U.S. 443 (1965). The effect of the state's procedural default is that, even were the judgment of the South Carolina Supreme Court to be reversed by this Court, the state supreme court would be powerless on remand to alter or amend its previous judgment in conformity with this Court's opinion. In short, respondent's entitlement to a new trial now rests on an adequate and independent state ground arising from petitioner's procedural default in failing to move to stay the remittitur. The final judgment of the South Carolina Supreme Court granting respondent a new sentencing trial has been filed in the lower court, and pursuant to state law must be enforced. Thus regardless of what conclusion this Court would ultimately reach as to the merits of the questions presented, Demetrius Gathers must and will receive a new sentencing trial.

"[T]he oldest and most consistent

petition, the state urged that Booth should not be held to extend to prosecutorial comment on evidence properly admitted at the guilt phase of a capital trial, or in the alternative that Booth should be overruled. Certiorari was granted on October 11, 1988.

SUMMARY OF ARGUMENT

Far from showing why Booth v. Maryland

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thread in the federal law of justiciability is that federal courts will not give advisory opinions." Flast v. Cohen, 392 U.S. 83 (1968). This rule emerges from the case and controversy requirement of Article III of the Constitution. In order for a claim to be justiciable pursuant to Article III, the case "must present a real and substantial controversy which unequivocally calls for adjudication of the rights" asserted. Poe v. Ullman, 367 U.S. 497, 509 (1961) (Brennan J., concurring). As a corollary principle, this Court will not decide "abstract, hypothetical or contingent questions." Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945). Thus to adjudicate a case which does not present a real and substantial controversy would call for this Court to issue an advisory opinion.

should be limited or overruled, this case demonstrates why the least controversial aspect of Booth--its exclusion of the "social worth" of a murder victim as a capital sentencing consideration--was correctly resolved. Indeed, the facts of this case show why a retreat from this principle as enunciated in Booth would convert the capital sentencing process into a demoralizing tangle of emotionally-charged irrelevancies. The prosecutor's emotional appeal for a death sentence based on his depiction of the murder victim as a devout Christian and a good citizen violated the Eighth Amendment because: (a) it diverted the jury's attention from the facts of respondent's crime, his character and record, and his personal moral blameworthiness; (b) it was itself

without fair support in the evidence; (c) it was by its nature difficult if not impossible to rebut; and, (d) it was injected into the proceedings despite the fact that South Carolina law had effectively assured respondent and his counsel that he need not be prepared to rebut such evidence, and indeed precluded him from mounting such a rebuttal. The solicitor's argument thus violated both the Eighth Amendment requirement that any decision to impose death as punishment be free from the influence of arbitrary or irrelevant factors, Gregg v. Georgia, Caldwell v. Mississippi, and the elementary due process principle that no defendant be condemned on the basis of facts that he is not permitted to explain or rebut. Gardner v. Florida.

Whatever the superficial appeal of petitioner's present claims, they would, if accepted, require this Court to recognize and enforce a constitutional right of capital defendants to attempt to "mitigate" their crimes by establishing that their victims were themselves people of bad or weak character, or that they held unpopular political or religious views. See Booth v. Maryland, 107 S.Ct. at 2541 (White, J., dissenting). Such character assassination of the memories of murdered persons would also become one of the unavoidable duties of competent defense counsel in capital cases, Strickland v. Washington, and yet another burden to be borne by the families and friends of the victim. Indeed, the due process principles of Brady v. Maryland would in many cases impose upon the

prosecutor an affirmative duty to assist the defense by providing information which the defense could use to besmirch the memory of the victim.

It was surely for such reasons as these that the South Carolina Supreme Court held, some two years before respondent's trial that the alleged bad character of a murder victim does not constitute mitigating evidence--and thus is not admissible--in a capital sentencing proceeding. State v. Gaskins. In view of Gaskins, respondent was powerless to rebut or respond to the prosecutor's devastating attack, and thus the "elemental due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain." Gardner v. Florida. For these

reasons, the South Carolina Supreme Court's application of Booth and its own precedent to vacate respondent's death sentence should be upheld.

ARGUMENT

I. THE PURPORTED RELIGIOUS FAITH AND GOOD CITIZENSHIP OF A MURDER VICTIM DO NOT PROVIDE A CONSTITUTIONALLY PERMISSIBLE BASIS UPON WHICH TO SENTENCE A CAPITAL DEFENDANT TO DEATH.

A. The fact that the physical evidence which provided the opportunity for the prosecutor's summation was properly introduced at the guilt phase of respondent's trial is irrelevant to the constitutional issues before the Court.

Before discussing the Eighth Amendment and due process issues presented by the prosecutor's closing argument in this case, a word should be said about petitioner's efforts to obscure these issues by its unrelenting emphasis on the

fact that the religious tract and the voter's registration card--which provided the springboard for the prosecutor's summation--were properly introduced at the guilt-or-innocence phase of respondent's trial. Brief of Petitioner at 27, 33, 45. Petitioner correctly points out that the Victim Impact Statement found unconstitutional in Booth was introduced at the sentencing phase of the trial as evidence in aggravation of punishment, whereas the victim's personal effects here were admitted as part of the state's proof of guilt. But this difference between Booth and the present case is without logical or constitutional significance. In arguing that the circumstances under which the victim's belongings were admitted should be held to immunize the prosecutor's subsequent

exploitation of that evidence from Eighth Amendment attack, petitioner has lost sight of the elementary principle that evidence in a criminal trial may be admissible for one purpose but not for another. See, e.g., Harris v. New York, 401 U.S. 222 (1971) (Miranda-violative confession may be used to impeach defendant's trial testimony, but not as substantive proof of his guilt). A murder victim's race, his nationality or ethnic background, his political beliefs and his religion may all be admissible in proving the defendant's guilt, since such characteristics might be necessary to prove the victim's identity, to set the scene of the crime, or even to show the defendant's motive to commit murder. But it is self-evident that the presence of such evidence in the trial record does

not authorize a prosecutor to urge the sentencing authority to condemn the defendant to death because of the victim's race, McCleskey v. Kemp, 481 U.S.___, 107 S.Ct. 1756 (1987), or his political or religious beliefs. See Zant v. Stephens, 462 U.S. 862, 888 (1983) (state may not attach "aggravating" label to constitutionally-protected status, beliefs or conduct). That the murder victim's religious artifacts and voter registration card were properly before the jury at the guilt-or-innocence phase of respondent's trial is simply irrelevant to the question which this Court must answer: whether the prosecutor's exploitation of these exhibits in order to urge imposition of a death sentence based on tenuous inferences concerning the victim's

religious and civic character violated the Eighth Amendment. For the reasons that follow, amici submit that the answer to this question is yes.

B. The prosecutor's appeal to sentence the defendant to death on the basis of his victim's religious and civic attributes is constitutionally intolerable under any view of Booth.

In Booth v. Maryland, 482 U.S. ____, 107 S.Ct. 2529 (1987), this Court held that evidence regarding the personal characteristics of a murder victim and the impact of his murder on his family and friends are normally inadmissible in aggravation of a capital defendant's punishment. The Booth majority concluded that this type of evidence created an impermissible risk that the decision to impose the death penalty would be based upon factors unrelated to the defendant's moral blameworthiness. 107 S.Ct. at

2533.

Booth was decided by a closely and sharply divided Court. But the holding of Booth upon which the majority and dissenting Justices disagreed is not the one applied by the South Carolina Supreme Court in this case. The primary question on which the Court divided in Booth concerned the constitutional validity of a statutory provision for informing the sentencing jury of the impact of the murder on the victim's family and community. 107 S.Ct. at 2539-2541 (White, J., dissenting); id. at 2541-2542 (Scalia, J., dissenting). Booth's other holding--that a death sentence may not turn on the perceived standing or character of the murder victim himself--occasioned no evident disagreement. Indeed, the principle that the law will

not apportion punishment according to a social gradation or hierarchy of victims is so elementary a rule of due process and equality under the law as to have occasioned little discussion in either the Booth majority or dissenting opinions.

It is perhaps for this reason that the petitioner's brief attempts to obscure rather than defend what the prosecutor actually did in his summation. According to the state, the prosecutor's prolonged and impassioned emphasis on what he implied to be the murder victim's religious beliefs and civic-mindedness was in reality no more than a discussion of the victim's vulnerability to his assailants. This recasting of the prosecutor's summation is utterly without support in the record. The fact that the

victim was attacked while in possession of religious artifacts may have been in some sense a circumstance of the crime. But the prosector's explicit and emotional appeal for a death sentence based on tenuous inferences about the victim's personal religious faith revealed nothing about either the murder or the murderer, and petitioner's insistence to the contrary may fairly be described as frivolous.

Petitioner's protestations notwithstanding, those portions of the prosecutor's summation condemned by the South Carolina Supreme Court in this case contain the very defect which even the Booth dissenters would have found unconstitutional. Just as "[i]t is no doubt true that the State may not encourage the sentencer to rely on a

factor such as the victim's race in determining whether the death penalty is appropriate," Booth, 107 S.Ct. at 2540 (White, J., dissenting), it is equally obvious that the constitution forbids such encouragement based on the victim's religious faith or his participation in civic or political activity. Indeed, it was precisely the absence of such irrelevant or invidious appeals by the prosecutor in Booth, combined with Maryland's express legislative authorization of victim impact evidence under state law, which led four members of the Court to vote to uphold the admissibility of such evidence. But had the prosecutor in Booth exploited the legislatively-authorized victim impact evidence in order to fashion an appeal for death based on the victims' allegedly

majoritarian religious beliefs or their political activities, reversal would have been required under the views expressed by the dissents no less than those of the majority.[3]

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[3]At two points in its brief, petitioner suggests that the victim characteristics rejected as sentencing considerations by the South Carolina Supreme Court in this case are analogous to such factors as whether "a victim was the President, a mayor, or a police officer whose loss clearly affected society," Brief of Petitioner at 40, or whether the victim was elderly, weak or disabled. Id. at 46, 56. These comparisons are spurious. The fact that a murder victim was a government official or a police officer killed in the line of victim is unquestionably one which may be considered in aggravation of the murderer's punishment. Roberts v. Louisiana, 431 U.S. 633 (1977). This is so both because such crimes implicate society's interest in deterring attacks on those charged with carrying out essential tasks for the common good, and because the intentional killing of such public servants may fairly be seen as especially morally reprehensible, involving as it does an indirect attack upon society as a whole. Similarly, both deterrence and retribution may be served by enhancing the penalty for murders of

The Booth Court's firm and unanimous rejection of invidious victim-based appeals for death is firmly grounded in established Eighth Amendment jurisprudence. Since Gregg, the Court has repeatedly emphasized that a capital sentencer's life or death decision must turn on the defendant's "personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782, 801 (1982). In order for the sentencer to properly assess the defendant's moral

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especially vulnerable victims, such as the very young, the disabled, and the elderly. But the fact that a murder victim's official duties or special vulnerability may be proper sentencing considerations in no way justifies appeals for a death sentence based on such characteristics as a victim's allegedly faithful adherence to orthodox religious views, see U.S. const. amend. I (prohibiting establishment of religion), and petitioner's effort to confuse these two very different issues is wholly without merit.

blameworthiness, the focus of the penalty phase of a capital trial should be on the "relevant facets of the character and record of the individual offender" and "the circumstances of the particular offense." Id. at 798; see also Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell and Stevens, JJ.); California v. Ramos, 463 U.S. at 1006; Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); Gregg, 428 U.S. at 189 (opinion of Stewart, Powell and Stevens, JJ.).[4]

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[4]Phrased somewhat differently, this Court has stated that at the penalty phase of a capital trial the jury must make an "individualized determination of whether the defendant in question should be executed, based on the characteristics of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

In addition to holding that a death sentence cannot be influenced by arbitrary factors, this Court has also recognized that a sentence of death cannot be imposed on invidious grounds such as race, religion, class or wealth, or some other constitutionally suspect criterion. See Zant v. Stephens, 462 U.S. at 885; Furman v. Georgia, 408 U.S. 228, 249-51 (1972) (Douglas, J., concurring). While the Booth Court divided over the magnitude of the risk that Maryland's Victim Impact Statement procedure would cause sentencing juries to consider such invidious factors, no member of the Court suggested that actual consideration of such factors could ever be deemed constitutionally permissible. Moreover, the Court has recognized that the capital sentencing decision is

peculiarly susceptible to the play of arbitrary factors such as the race of the defendant and victim. Turner v. Murray, supra.[5] For all of these reasons, there is no basis whatsoever to question the continued vitality of Booth's recognition that all victims are inherently equal before the law, and that no death sentence may be imposed upon the basis of a sentencing jury's belief that the

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[5]This is especially true in the South, where the majority of capital cases arise. Permitting the characteristics of the victim to be considered by the jury in its decision whether to sentence a defendant to death will, in many cases involving white victims and black defendants, be to sanction the consideration of race in the capital sentencing process. The interjection of race may not be overt. But unconscious considerations of color will inevitably arise when the jury is expressly invited to base its sentencing decision on what it deems to be the relative social worth of the murder victim and the convicted defendant in a capital case.

victim was especially religious, "saintly," or politically orthodox.

C. Prosecutorial license to use the alleged good character of murder victims as evidence in aggravation of punishment will necessarily give rise to a constitutional right of accused murderers to attack the character and minimize the social worth of their victims.

Any doubt as to the correctness of the Court's holding in Booth that a capital sentencer's life-or-death decision should not "turn on the perception that the victim was a sterling member of the community rather than someone of questionable character," 107 S.Ct. at 2534, may be dispelled by considering the practical effect of a contrary holding. As Justice White acknowledged in his Booth dissent, there is "[n]o doubt [that] a capital defendant must be

allowed to introduce relevant evidence in rebuttal to a victim impact statement." 107 S.Ct. at 2541. While this observation was made during a discussion of the admissibility of evidence concerning the effect of a murder on the family and community of the victims, there can also be no doubt that the same right of rebuttal would arise from any effort to persuade a jury to sentence a defendant to death because of the good personal qualities of the murder victim. This case demonstrates, however, just how problematic such a right of rebuttal would actually prove to be. Here, for example, the prosecutor's portrayal of the victim as a religious "saint in the game of life," should (but under South Carolina law did not, see infra at 54-64) entitle the defendant to an opportunity

to show that the victim's religious faith was actually the psychotic and grandiose religious ideation of a chronic schizophrenic. By the same token, the voter registration card which the prosecutor held out as evidence of the victim's commitment to his community may just as easily have been obtained by the victim in order to sell his vote for a few dollars each election day. And if the prosecution was entitled to offer the former inference as a reason to sentence Mr. Haynes' killer to death, the defendant was constitutionally entitled to investigate and attempt to prove the latter as a reason why his own life should be spared.

There is nothing unusual about such doubts concerning the character of a murder victim, and once the courthouse

door is opened to them, they will arise in a substantial number of cases. Was a murdered storeowner known to use racial epithets? Did he discriminate by race in hiring or credit? Was a murdered minister a homosexual? Did an ambushed police officer have a reputation for harassing black or Hispanic citizens? Was Victim A a carrier of the AIDs virus, Victim B a secret collector of pornographic magazines, or Victim C a survivor of a suicide attempt or a cocaine overdose? Assuming that none of these facts about a murder victim were known to the killer or directly related to the crime itself, it is clear that they are utterly irrelevant to the defendant's moral blameworthiness. But, in many cases, such facts might nevertheless modulate the jury's horror

or outrage about the crime, and could well spell the difference between a sentence of life and one of death.

Recent South Carolina cases provide some revealing examples of where such diversions lead. In State v. Gaskins, the defendant was convicted in the murder-for-hire of a Death Row inmate, Rudolph Tyner. In mitigation of his punishment, the defendant sought to publish to the jury his victim's own confession to the double robbery-murder which had landed him on Death Row. See State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). Upholding the trial judge's refusal to admit this proof of the victim's bad character, the South Carolina Supreme Court held that evidence of a murder victim's bad characteristics are not admissible at the penalty phase

of a capital trial. Gaskins, 284 S.C. at 128; see also State v. Bell, 293 S.C. 391, 402, 360 S.E.2d 706 (1987), cert. denied, 108 S.Ct. 734 (1988) (recognizing that Gaskins precludes admission of evidence regarding victim's bad character).

There is no doubt that this holding of Gaskins underlay the state supreme court's disapproval of the prosecutor's remarks in this case. Although the state court began its discussion of the issue by citing Booth's Eighth Amendment holding, the court also expressly relied on its own decision in Gaskins, and summarized Gaskins as holding that "evidence of [a] victim's bad character [is] not admissible as mitigating evidence" in the sentencing phase of a capital case. J.A. at 66.

Nor was Gaskins the only case prior to Gathers in which the South Carolina Supreme Court had had occasion to consider the extent to which character-of-victim evidence "'shift[s] the focus of the sentencing hearing away from the defendant."' State v. Gathers, 295 S.C at 483, J.A. at 66 (quoting Booth v. Maryland, supra, 107 S.Ct. at 2535). By the time that it reached this conclusion in Gaskins, the state court had reviewed trial records of cases such as State v. Horace Butler, 277 S.C. 452, 290 S.E.2d 1, cert. denied 459 U.S. 932 (1982). In Butler, the defendant was convicted of raping and murdering an eighteen year-old girl. The evidence revealed that the defendant and the accused were complete strangers before their fatal encounter. During the course of the trial, however,

defense counsel sought to bring to the jury's attention the fact that the victim had severe mental and emotional problems and had tried to kill herself on at least two occasions. Counsel also attempted to introduce evidence that the victim had been, while intoxicated, at fault in an automobile accident which resulted in the death of another party. Counsel further wished to introduce evidence in this case involving the alleged kidnapping, murder and rape of a young white woman by a black man that the victim had been known to frequent a bar, patronized almost exclusively by black persons, where illegal drugs were sold, and that the victim had bought drugs there. Finally, counsel wished to introduce evidence that the victim had sexual relations with other black men, and further that one of

the state's witnesses, who was charged as an accessory after the fact in Butler's case, had caught a venereal disease from her. All this evidence was excluded by the trial court on the basis, inter alia, that evidence regarding the victim's character was not relevant. Tr. 478-514, State v. Horace Butler, supra.

In another decision which followed but did not rely on or cite Booth, the South Carolina Supreme Court disapproved prosecutorial argument which stressed the generosity and good deeds of the murder victim in an interracial robbery-murder. State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987). Viewed in the context of its past decisions, Reed provides a further example of the South Carolina courts' unwillingness to see capital sentencing proceedings degenerate into adversarial

post-mortem inquiries into the social worth of the murder victims.

The South Carolina courts' consistent rejection of these types of evidence and argument was unremarkable at the time the rulings were made. But if the range of capital sentencing considerations is now to be expanded to encompass the moral and religious character of the murder victim, all of these aspects of the victims' history and character must be deemed to have become relevant to rebut the prosecution's character evidence. See generally Barefoot v. Estelle, 463 U.S. 880, 901 (1983) ("the adversary process [can] be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of

the case"). Indeed, once the relevance of such character evidence is accepted, not even the absence of prosecution evidence or argument concerning the good character of the murder victim can serve to remove the victim's character as a sentencing consideration. Rather, evidence of the victim's bad character must be deemed "'mitigating' in the sense that it might serve 'as a basis for a sentence less than death,'" Skipper v. South Carolina, 476 U.S. 1, 4-5 (1976) (quoting Lockett v. Ohio, 438 U.S. 506, 604 (1978)), and its admission in mitigation constitutionally compelled. Compare Jurek v. Texas, 428 U.S. 262 (1976) (defendant's probable future dangerousness is a valid capital sentencing consideration) with Skipper v. South Carolina, supra (Eighth Amendment

requires admission of evidence tending to establish defendant's non-dangerousness).

This expansion of the range of relevant mitigating or rebuttal evidence will effect very disturbing changes in the other aspects of the capital sentencing process. If the weaknesses, limitations and human foibles of murder victims are to become fair game in capital sentencing proceedings, the duty to uncover and present such evidence will necessarily become one of the responsibilities of reasonably competent defense counsel in capital cases. See generally Burger v. Kemp, 483 U.S. ___, 107 S.Ct. 3114 (1987). No matter how personally distasteful to defense counsel, the search for evidence with which to minimize the sentencer's regard for the murder victim might be, the

prosecution's right to "ennoble" the victim by a one-sided presentation of his strengths and achievements will impose a corresponding duty on defense counsel to investigate and prove the victim's moral shortcomings and lapses, the burdens which the victim's failings or weaknesses may have imposed upon those around him, or anything else which might persuade the sentencer to devalue the victim's life.

Moreover, once the strengths and weaknesses of a murder victim are declared to be grist for the mill of adversary litigation, prosecutors who learn of information which might tend to lower the sentencer's estimation of the personal worth of the victim in a capital murder case will be constitutionally obligated to disclose such information to the accused under the due process

principles of Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Bagley, 473 U.S. 667 (1985). The most intimate information concerning a murder victim's background inadvertently uncovered during a homicide investigation or revealed by grieving relatives or friends--facts that the victim suppressed throughout his lifetime--could be suppressed no longer as his killer's sentencing hearing approached. And if the state is correct in this case, the fact that the killer may have known nothing of his victim's background--good or bad--cannot serve to protect the victim's memory against attack as the defendant attempts to save his own life by convincing the jury that the loss to society occasioned by his crime was not so great as it might at first have appeared. In sum, the Booth

Court was wholly correct in its characterization of "a 'mini-trial' on the victim's character" as "more than simply unappealling." 107 S.Ct. at 2535. However well-intentioned may be those who, under the banner of "victims' rights," would have this Court constitutionalize the right of both prosecution and defense to mount such demoralizing legal sideshows in capital sentencing hearings, see, e.g., Brief of Amici Curiae Center for Civil Rights and the Stop! the Madness Foundation, a proper regard for the dignity and memory of each victim of murder no less than for the commands of the Eighth Amendment requires that the Court decline the invitation to do so.

D. The South Carolina Supreme Court correctly interpreted this Court's decision in Booth v. Maryland in this and

other decisions.

Petitioner suggests in its brief that the rule established by this Court in Booth is unworkable and is being misapplied and misunderstood by the lower courts. Petitioner's brief at 48, 56. However, a review of other decisions of the South Carolina Supreme Court resolving allegations of Booth error contradicts petitioner's contention. In State v. Bell, 293 S.C. 291, 360 S.E.2d 706 (1987), cert denied, ___U.S. ___, 108 S.Ct. 734 (1988), the appellant maintained that it was error to permit the state to introduce testimony regarding the character of the victim, her future plans and her lifestyle. The court, however, relying on Booth, determined that there was no constitutional violation because the

evidence of the victim's characteristics was directly related to the circumstances of the crime and had not been otherwise used in an impermissible manner. 293 S.C. at 302-03. Similarly, in State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988), it was maintained on appeal that evidence regarding the victim's habits and family life violated the Eighth Amendment. Again the court determined that there was no error because the evidence was introduced at the guilt phase of the trial "as circumstantial evidence that the victim's sudden disappearance was not voluntary." 295 S.C. at 472.

Bell, Howard and Gathers, viewed together, clearly indicate that the South Carolina Supreme Court has properly interpreted and applied the Eighth

Amendment principles set forth in Booth v. Maryland, and the other capital punishment decisions of this Court. A review of these three decisions reveals that the state court has, consistent with Booth, determined that where evidence of a victim's character is related to the circumstances of the crime, and is not used in a constitutionally impermissible manner, the evidence is properly admissible even though it may increase the state's chance of obtaining a death sentence. However, the state court determined that when, as in respondent's case, evidence of a victim's christianity and citizenship are used for the sole purpose of suggesting that a capital defendant should be sentenced to death, a resulting death sentence cannot stand. Thus the South Carolina Supreme Court

correctly recognized that in respondent's case it was the use to which the Game Guy's prayer and the voter registration card were put--to argue that Gathers should be sentenced to death because the victim was a good Christian and citizen--that violated the Eighth Amendment.

II. BECAUSE SOUTH CAROLINA LAW PRECLUDED RESPONDENT FROM INTRODUCING EVIDENCE REGARDING THE VICTIM'S BAD CHARACTER AS A SENTENCING CONSIDERATION, HIS DEATH SENTENCE WAS SECURED IN VIOLATION OF THE DUE PROCESS CLAUSE AS HE WAS DEPRIVED OF AN OPPORTUNITY TO MEET AND REBUT THE STATE'S ASSERTIONS.

As was noted previously in this brief, both the justices in the majority and the dissenting justices in Booth agreed that "if the state is permitted to introduce evidence of the victim's personal qualities, it cannot be doubted that the defendant also must be given the chance to rebut this evidence." 107 S.Ct. at

2535; 107 S.Ct. at 2541 ("[n]o doubt a capital defendant must be allowed to introduce relevant evidence in rebuttal to a victim impact statement") (Justice White dissenting).[6] The Booth majority concluded that to permit character rebuttal evidence created the "prospect of a 'minitrial' on the victim's character. . . [which] could well distract the jury from its constitutionally required task--

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[6]This aspect of Booth was grounded in the due process principles established in Gardner v. Florida, 430 U.S. 349 (1977) (due process requires that a capital defendant be given a chance to rebut material contained in a pre-sentencing report), and Skipper v. South Carolina, 476 U.S. 1, 5, 9-12 (1986) (all nine justices agreeing--both in the majority and concurring opinions--that it violated Gardner v. Florida to exclude evidence of the defendant's adaptability to prison but yet permit the prosecutor to argue the defendant's future dangerousness as a reason to impose the death penalty).

determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." Id.[7] It was surely for this reason, some examples of which were set forth in subsection C of section I of this brief (supra at 35-50) that the South Carolina Supreme Court held in State v. Gaskins, two years before respondent's trial, that the bad character or criminal history of

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[7]Aside from the right of rebuttal, another fundamental principle of procedural due process is that an accused is entitled to notice as to the specific charges against him, and thus a fair opportunity to meet the prosecution's evidence. See Cole v. Arkansas, 333 U.S. 196, 201 (1948) ("[n]o principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal").

a murder victim is inadmissible in mitigation of the murderer's punishment.[8] See also State v. Bell, supra (recognizing that Gaskins precludes admission of evidence regarding victim's bad character).[9] Thus, both before and

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[8]Gaskins, who was an inmate serving a life sentence for murder, was prosecuted for the murder of a death row inmate, Rudolph Tyner. At the sentencing phase of his trial, Gaskins attempted to offer into evidence Tyner's confession to the murders for which he was convicted and sentenced to death. The trial judge would not permit Gaskins to introduce the evidence, and this claim was raised on direct appeal to the South Carolina Supreme Court. In its brief before that Court, the Attorney General argued the failure to admit the confession was not erroneous because "Tyner's [the victim's] character was irrelevant to the determination of whether Appellant's sentence should be life or death, and the trial judge properly excluded it." Brief of Respondent Attorney General in State v. Gaskins, supra at 72. The South Carolina Supreme Court agreed with the Attorney General, and affirmed Gaskin's sentence of death.

[9]Similarly, after holding that the prosecutor's argument violated the Eighth Amendment, the South Carolina Supreme

after this Court's decision in Booth v. Maryland, the South Carolina Supreme Court has ruled that a capital defendant may not introduce evidence regarding the bad acts or the bad character of a murder victim as a reason that a sentence of life imprisonment should be imposed.

Thus respondent's counsel prepared his defense in the reasonable belief that their client would not be required to rebut evidence or argument concerning the religious or civic virtues of the man he was accused of murdering. Moreover, had defense counsel attempted to mitigate their client's punishment by introducing evidence tending to denigrate the victim,

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Court in respondent's case acknowledged that State v. Gaskins supported its conclusion as it held that "evidence of [a] victim's bad character [is] not admissible as mitigating evidence in sentencing phase." 295 S.C. at 483, 369 S.E.2d at 144; J.A. 66.

there is little doubt that the rule of Gaskins would have been applied to prevent them from doing so. In sum, Gaskins deprived respondent both of the ability to attack the victim's character and of any notice that he might find himself impelled to do so by the state's trial tactics. And it was in this context that the prosecutor, without warning of any sort, transformed two bits of physical evidence into an impassioned appeal for a death sentence based on the supposed religious values and even saintliness of the murder victim.

Under such circumstances, what happened here plainly violated the "elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'"

Skipper v. South Carolina, 476 U.S. at 5 n. 1, quoting Gardner v. Florida, 430 U.S. at 362.[10] Just as there is no doubt that a capital defendant must be allowed to introduce relevant evidence in rebuttal to a victim impact statement, there is also no doubt that respondent in this case was accorded no such opportunity. In Booth, state law expressly provided for the admission of

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[10]Similarly Justice Powell's concurrence in Skipper (joined by Chief Justice Burger and Justice Rehnquist) noted that:

> petitioner in this case was not permitted to "deny or explain" evidence on which his death sentence may, in part, have rested. This error was aggravated by the prosecutor's closing argument, which emphasized and exaggerated petitioner's misconduct in prison after his arrest. Therefore, petitioner's death sentence violates the rule in Gardner.

476 U.S. at 11.

victim impact statements, and thus the defendant had both notice of the evidence, and a full opportunity to rebut that evidence had he wished to do so. Md.Ann.Code, Art. 41, §4-609(c) (1986); 107 S.Ct. at 2541. But South Carolina law provides just the opposite: defendants are expressly forbidden by Gaskins from advancing the bad character or record of their victims as reasons for leniency, and South Carolina's statutory capital sentencing scheme makes no provision for consideration of victim characteristics in aggravation of punishment. See State v. Reed, 293 S.C. 515, 519, 362 S.E.2d 13, 15 (1987) (condemning prosecutorial argument concerning the purported good character of murder victim). Accordingly, the prosecutor's hyperbolic ennobling of the

murder victim in this case was fundamentally unfair because, even assuming the relevancy of the alleged religious characteristics on which it was based, the prosecutor's appeal was not subject to rebuttal or denial by the defendant. Gardner v. Florida, supra; Skipper v. South Carolina, supra.[11]

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[11]Furthermore, as this case involves the denial of the opportunity to rebut or explain prosecutorial argument, petitioner's reliance on Donnely v. DeChristofero, 416 U.S. 637 (1974) (test to determine impropriety of prosecutorial argument is whether the argument "so infected the trial with unfairness as to make the resulting [sentence] a denial of due process), is misplaced. See Petitioner's brief at 48. Rather, because the state relied upon the victim's religious and civic virtues as a reasons that respondent should be sentenced to death, under circumstances where he was not permitted to introduce evidence regarding the bad character of the victim, the rule of Gardner v. Florida and Skipper v. South Carolina is the proper standard by which to judge the prosecutor's argument in respondent's case, as opposed to the fundamental fairness standard of Donnely. Therefore, in respondent's case, the

The South Carolina Supreme Court's reliance on State v. Gaskins in its decision, as well as its reference to that part of the Court's reasoning in Booth having to do with a capital defendant's right of rebuttal, see 295 S.C. at 483-84, 369 S.E.2d at 144, J.A. 66, makes clear that it recognized this particular constitutional error in the sentencing phase of respondent's trial. Under these circumstances, the state court correctly held that as a result of its ruling in State v. Gaskins, respondent was denied the opportunity to explain or rebut the state's argument as to why he should be sentenced to death.

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violation of due process is established because he "was not permitted to 'deny or explain' evidence on which his death sentence may, in part, have rested." Skipper, 476 U.S. at 11 (Powell, J. concurring) (quoting Gardner v. Florida, supra).

Therefore, because established South Carolina law at the time of Gather's trial precluded the admission of evidence of the bad character of a murder victim, a straightforward application of the due process principles established by this Court in Gardner v. Florida, Skipper v. South Carolina and Booth reveal the constitutional infirmity in respondent's sentence of death. For this additional reason, the judgment of the South Carolina Supreme Court should affirmed, and Demetrius Gathers should be accorded the fair sentencing hearing to which every defendant, no matter what his crime, is constitutionally entitled.

CONCLUSION

For the reasons set forth in this brief, amici respectfully submit that the judgment of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

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MOTION FILED
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No. 88-305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

VS.

DEMETRIUS GATHERS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF PROFESSORS OF LAW BARBARA BABCOCK, MICHAEL CHURGIN, WALTER E. DELLINGER, SANFORD LEVINSON, FRANK MICHELMAN, AVI SOIFER, AND ROBERT WEISBERG AS *AMICUS CURIAE*

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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

vs.

DEMETRIUS GATHERS,

Respondent

On Writ of Certiorari to the
Supreme Court of South Carolina

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Professors of Law Barbara Babcock, Michael Churgin, Walter E. Dellinger, Sanford Levinson, Frank Michelman, Avi Soifer, and Robert Weisberg As Amicus Curiae respectfully move the Court, pusuant to Rule 36.3, for leave to file

the attached Brief as amicus curiae in support of the Respondent.

1. Respondent has consented to this filing, but counsel for Petitioner refused to consent to the filing unless he was able to review the contents of the Brief, which proved impossible due to the time constraints involved, necessitating this Motion.

2. Amici are professors of constitutional law at five law schools in the United States. Barbara Babcock and Robert Weisberg are professors of law at Stanford Law School, Frank Michelman is a professor of law at Harvard Law School, Walter E. Dellinger is a professor at Duke University Law School, Michael Churgin and Sanford Levinson are professors at the University of Texas Law School, and Avi Soifer is a professor at Boston University Law School. Counsel

for amici is a professor of law at the University of Tennessee Law School.

3. Amici wish to file this brief to suggest to the Court that this case presents an issue more significant than whether the Court's decision in Booth v. Maryland, 96 L. Ed. 2d 440 (1987) was correct, namely whether it would be inadvisable for the Court to overrule Booth even if a majority of the Court now believes it was incorrectly decided, in view of the substantial risk that doing so would erode the Court's moral authority. Amici believe that serious consideration should be given to the larger consequences of any decision to overrule Booth, consequences which reach beyond the parameters of constitutionally permissible evidence and argument in a capital sentencing trial and implicate the reasons the Court's pronouncements

carry moral authority, namely that they are seen as arising from impartial and reasoned judgments. Amici submit that the conditions which permit the Court to overrule precedent without undermining its moral authority are not so clearly present that the Court can overrule Booth without creating a substantial risk of incurring such erosion.

DATED this 31st day of January, 1989.

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BRIEF AMICUS CURIAE OF PROFESSORS OF LAW BARBARA BABCOCK, MICHAEL CHURGIN, WALTER E. DELLINGER, SANFORD LEVINSON, FRANK MICHELMAN, AVI SOIFER, AND ROBERT WEISBERG AS AMICUS CURIAE

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INTEREST OF AMICI

The interest of amici is set out in the Motion accompanying this Brief.

SUMMARY OF ARGUMENT

The grant of certiorari to consider whether Booth misconstrued the require-

ments of the Eighth Amendment and was wrongly decided, apparently based on nothing more than a change in the Court's composition between the time of the Booth decision and now, is profoundly troubling, because it raises questions about the extent to which the Court is prepared to see respect for its authority undermined by the "precipitous overruling" of a precedent. It is generally agreed that stare decisis will permit the Court to overrule a prior decision which has come to be seen as erroneous if there have been significant intervening changes in society, its legal institutions, or in legal doctrine. Otherwise, particularly with regard to recently decided cases, overruling a precedent, except to correct the most egregious of errors, creates the appearance that the change has been occasioned by a change in the identity of

the identity of this Court's personnel. In a system that prizes stability and self-restraint in judicial decision-making, such a course would be counter-productive and would deprive the law of the basic discipline that legitimates it in the eyes of the public.

In the brief time since Booth was decided nothing has occurred that can justify overturning it. Even those Justices who disagreed with Booth have pointed to nothing in the result or the majority's opinion that is worse than an incorrect judgment call on a narrow issue about which views can reasonably differ. No major principle of constitutional law, having the potential to shape the growth of constitutional doctrine, is implicated in the debate between the majority and the dissent in Booth nor is there any large issue of governmental power or

direction that rides on the question of whether Booth is overruled; morever, there is no indication that Booth has been seen as such an aberration by the states that it has caused disruption in the administration of their capital sentencing schemes.

In short, the substantive issue in Booth is not important enough to warrant reversing the Court's position on it at the cost of the harm which such a reversal will do to the values of stare decisis, and the appearance that will be created that the identity of the Court's personnel is the key factor driving the decision to overrule.

ARGUMENT

Just two Terms ago, the Court held in Booth v. Maryland, 96 L.Ed.2d 440 (1987), that the Eighth Amendment precluded the consideration of "victim

impact" evidence in the sentencing process in a capital trial.[1] The decision was 5-4, and the controversy between the majority and the dissent was sharply defined and spirited.[2]

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1 The Victim Impact Statement introduced in Booth's trial included three distinct types of information: a description of the personal characteristics of the victim of the murder, a description of the emotional impact of the crime on the victim's family members, and the family members' opinions and characterizations of the crime and the defendant. 96 L.Ed.2d at 448.

2 The controversy centered on evidence of the emotional impact of the crime on the victim's family members. In the majority's view, the Eighth Amendment permits the defendant's moral culpability to be measured only in relation to his or her purposeful behavior. 96 L.Ed.2d at 449-50. Since the impact of the crime on the victim's family members is rarely known or in any way taken into account by the defendant when the crime is committed, from the majority's perspective, this evidence is generally irrelevant to the assessment of the defendant's moral culpability. Id. In the dissenters' view, the Eighth Amendment does not confine the assessment of moral culpability to the defendant's purposeful behavior. 96 L.Ed.2d at 457

One term ago, another Booth issue was presented in Mills v. Maryland, 100 L.Ed.2d 384 (1988). The issue was not decided because a majority of the Court held that the instructions at Mills' capital sentencing trial violated Lockett v. Ohio, 438 U.S. 586 (1978). Mills v. Maryland, 100 L.Ed.2d at 393-400. However, a dissenting opinion joined by four Justices expressed the view that Booth was wrongly decided and should be overruled. Id. 407-08 (Rehnquist, C.J., joined by O'Connor, Scalia, and Kennedy, J.J., dissenting).

(White, J., dissenting); id. at 459 (Scalia, J., dissenting). Because in their view, moral culpability includes responsibility for the harm inflicted by a murder, even if unintended, the Eighth Amendment does not preclude the sentencer's consideration of the impact of the crime on the victim's family members. 96 L.Ed.2d at 457 (White, J.); id. at 459 (Scalia, J.).

After Mills, it thus appeared that five Justices on the Court disagreed with the holding in Booth: Justice White, on the basis of his dissent in Booth; Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia, on the basis of their dissents in Booth and Mills; and Justice Kennedy, on the basis of his dissent in Mills. With the retirement of Justice Powell, who authored the majority opinion in Booth, and the appointment of Justice Kennedy as his successor, Booth no longer appears to have the support of a majority of the Court.

The grant of certiorari in Mr. Gathers' case has included the question whether Booth misconstrued the requirements of the Eighth Amendment and was "wrongly decided." The decision to take up this question, apparently based on nothing more than the change in the

Court's composition between the time of its decision in Booth and the present, is profoundly troubling. It feeds directly into "the existing cynicism that constitutional law is nothing more than politics carried on in a different forum." Monaghan, Stare Decisis and Constitutional Adjudication, 88 Columbia L. Rev. 723, 753 (May, 1988).

For this reason, we urge the Court to give serious consideration to the larger consequences of any decision to overrule Booth. These consequences reach beyond the parameters of constitutionally permissible evidence and argument in a capital sentencing trial and touch upon the very reason the Court's pronouncements carry moral authority: "public faith in the judiciary as a source of [impartial] and reasoned

judgments." Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970).

Based on our analysis of the principles underlying stare decisis, the Booth decision, and the context in which the Court has taken up the question of whether to overrule Booth, we urge the Court not to overrule Booth, even though a majority of its members may support such a decision doctrinally. The conditions which permit the Court to overrule precedent without undermining its moral authority are not so clearly present that the Court can overrule Booth without creating a substantial risk of such erosion.[3]

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[3] In arguing against the overruling of Booth, we do not mean to suggest that the facts of the Gathers case call upon the Court to reach this issue. In fact, it appears that Gathers involves only a relatively minor aspect of the Booth decision. In Gathers, the issue was not whether to admit a Victim Impact Statement, but whether the

A. Stare Decisis Nurtures Public Faith In the Judiciary As A Source Of Impersonal And Reasoned Judgments

"'Very weighty considerations underlie the principle that courts should not lightly overrule past decisions'" Miller v. Fenton, 474 U.S. 104, 115 (1985), quoting Moragne v. States Marine Lines, Inc., 398 U.S. at 403. Stare decisis, "while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law."

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prosecutor could argue that certain aspects of the victim's character, his alleged religiosity and good citizenship, could serve as appropriate reasons for sentencing Mr. Gathers to death. While it is true that the majority opinion in Booth stated that it rejected the contention that the "victim's personal characteristics are proper sentencing considerations in a capital case," 96 L.Ed.2d at 451, we do not think that the Booth decision is properly read to exclude consideration of such characteristics when they were "known to the defendant before he committed the offense." Id. at 450.

Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 420 (1982). The doctrine of stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals..." Vasquez v. Hillery, 474 U.S. 254, 265 (1986). See also Cardozo, The Nature of the Judicial Process 112 (1921) (adherence to precedent ensures impartiality).

While precedent is not a straitjacket, respect for precedent establishes the Court as the guardian of the laws, while disrespect for precedent undermines regard for the Court itself. As Justice Powell has put it: "The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitous overruling of ... precedents." Garcia v. San Antonio

Transit Authority, 469 U.S. 528, 559 (1985) (dissenting opinion). Thus, one commentator has noted that even when there has been a change in the composition of the Court, a dissenter in an earlier case may well hesitate to overrule the decision, fearing that "the Court's reputation will suffer if the doctrinal shift is perceived to be the result of nothing except altered membership." Kelman, The Forked Path of Dissent, 1985 Sup. Ct. Rev. 227, 264 (1985).

In general, stare decisis will permit the Court to overrule prior decisions which have come to be seen as erroneous only if there have been significant intervening changes in society, in legal institutions, or in legal doctrine. A precedent that has not stood the test of time may be overruled,

but it should first be given a fair chance to do so. Compare United States v. Miller, 471 U.S. 130, 144 (1985)(describing Ex parte Bain, 121 U.S. 1 (1887), as a case that "has simply not survived"), and United States v. One Assortment of Eighty-Nine Firearms, 456 U.S. 354 (1984)(recognizing that Coffey v. United States, 116 U.S. 436 (1886), had survived only as a source of doctrinal confusion), and Puerto Rico v. Branstad, 97 L.Ed.2d 187, 197 (1987)(noting that Kentucky v Dennison, 24 How. 66 (1861), was the "product of another time"), with Braswell v. United States, 101 L.Ed.2d 98 (1988)(reconciling Hale v. Henkel, 201 U.S. 43 (1906), and its progeny with Fisher v. United States, 425 U.S. 391 (1976)), and United States v. Powell, 469 U.S. 57, 63 (1984)(refusing to overrule Dunn v. United States,

284 U.S. 390 (1932), despite the demise of a part of Dunn's premises and noting that "this is not a case where a once-established principle has gradually been eroded by subsequent opinions of this Court"). As the Court explained in Vasquez v. Hillery,

> While stare decisis is not an inexorable command, the careful observer will discern that any detours from the straight path of stare decisis in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.' Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932).... [E]very successful proponent of overruling precedent has borne the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by stare decisis yield in favor of a greater objective.

474 U.S. at 266.

Thus, in Ford v. Wainwright, 477 U.S. 399 (1986), the Court put aside its

1950 decision in Solesbee v. Balkcom, 339 U.S. 9, in part because the Eighth Amendment had not been applied to the States at the time of Solesbee:

> Now that the Eighth Amendment has been recognized to affect significantly both the procedural and the substantive aspects of the death penalty, the question of executing the insane takes on a wholly different complexion. The adequacy of the procedures chosen by a State to determine sanity, therefore, will depend upon an issue that this Court [in Solesbee] ... never addressed ....

Id. at 405. And in Ake v. Oklahoma, 470 U.S. 68 (1985), the Court overruled U.S. ex rel Smith v. Baldi, 344 U.S. 561 (1953), explaining that

> [Baldi] was decided at a time when indigent defendants in state courts had no constitutional right to even the presence of counsel. Our recognition since then of elemental constitutional rights, each of which has enhanced the ability of an indigent defendant to attain a fair hearing, has signaled our

> increased commitment to assuring meaningful access to the judicial process. Also, neither trial practice nor legislative treatment of the role of insanity in the criminal process sits paralyzed simply because this Court has once addressed them, and we would surely be remiss to ignore the extraordinarily enhanced role of psychiatry in criminal law today.

Id. at 85.

To be sure, while the Court has the inherent power to overrule its prior decisions -- and will do so "when convinced of former error," Smith v. Allwright, 321 U.S. 649, 665 (1944)-- that power is generally not exercised, because of the respect for law engendered by stare decisis, unless there has been an intervening change in law or legal practices such as those recognized in Ford and Ake.[4] For this reason, Justice

[4] See also Brown v. Board of Education, 347 U.S. 483, 489-95 (1954), overruling Plessy v. Ferguson, 163 U.S. 537 (1896).

Stevens has written, "I am firmly convinced that we have a profound obligation to give recently decided cases the strongest presumption of validity." Florida Dept. of Health v. Florida Nursing Home Ass'n., 450 U.S. 147, 153 (1981) (Stevens, J., concurring). To do otherwise, except to correct the most egregious of errors, is to create the appearance that a "sudden reversal[] of direction ... ha[s] been occasioned by nothing more significant than a change in the identity of this Court's personnel." Id. at 153.[5]

Because stare decisis requires more of the Court than simply "exploring the

[5] See J. Nowak, J. Young, and R. Rotunda, Constitutional Law 159-63 (1978) (criticizing the Court's decision in National League of Cities v. Usery, 426 U.S. 833, 853-55 (1976), to overrule Maryland v. Wirtz, 392 U.S. 183 (1968), on this basis).

precedents as possible models for current decision making," and because "[i]n some sense, the second court must feel bound by the precedent," Professor Monaghan has concluded that even if a precedent is clearly wrong, that factor should not be given much independent weight in deciding whether to overrule it. Monaghan, op. cit., supra, 80 Columbia L. Rev. at 755, 762. "[A]ny departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212 (1984). The mere conviction that a prior case was erroneously decided is usually not enough to justify overruling it. See Stevens, The Life Span of a Judge-Made Rule, 58 N.Y.U. L. Rev. 19 (1983). For as the dissenting Justices explained in Vasquez v. Hillery, "Adhering to precedent 'is usually the wise policy, because in most

matters it is more important that the applicable rule of law be settled than that it be settled right.'" 474 U.S. at 269 (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting).

In short, the rule of law requires adherence to precedents unless some stronger reason exists to overrule them than the belief -- however powerful-- that they were wrongly decided in the first place. This must be so in any system that prizes stability and self-restraint in judicial decision-making. For otherwise, the obvious desirability of reaching "correct" decisions on the merits and the natural tendency of any judge to identify "correctness" with his or her own views on the merits would deprive the law of the basic discipline that legitimates it. A question surely more important than "correctness" in

this sense is how much of the Court's rightful authority would survive if every 5-to-4 decision were overruled as soon as a majority Justice retired and was replaced by one who would have voted with the minority in the first instance.

B. There Is No Sufficient Basis For Overruling Booth v. Maryland

In the brief time since Booth was decided nothing has occurred that can justify a decision overturning it. Even those Justices who have disagreed with Booth have pointed to nothing in the result or the majority opinion that is worse than an incorrect judgment call on a narrow issue upon which reasonable views can differ. To the extent that the decisions of the lower courts since Booth shed light on the wisdom and practicality of Booth's resolution of the issue, there appears to be no reason for concern, much

less alarm. Under these circumstances, the case cannot be overruled without giving the appearance that the identity of the Court's personnel is the key factor driving the decision to do so.

Quite simply: the substantive issue in Booth is not important enough to warrant reversing the Court's position on it -- whichever position may be "right" -- at the cost of the harm which such a reversal will do to the values of stare decisis. Consider:

(1) That the views expressed by the dissenters in Booth do not demonstrate that the views of the majority were aberrations in the orderly development of constitutional doctrine. The analysis articulated by the dissenters was entirely reasonable, perhaps correct, and certainly entitled to prevail had that analysis commanded a

majority of the Court at the time Booth was decided. However, the dissenters' analysis cannot lay claim to a basis in precedent which allows it to be said that the majority analysis is out of touch with major doctrinal developments or established currents in the law. Cf. Ex parte Bain, supra; Coffey v. United States, supra. The difference between the majority and minority positions in Booth is no more than a disagreement over the way in which the particular question presented in that case should have been decided. The dissenters simply cannot call to their support any large constitutional principle with which the majority's position is in conflict. Accordingly, there are no "changes in society or in the law [that] dictate that the values served by stare decisis [should] yield in favor of a greater objective,"

Vasquez v. Hillery, 474 U.S. at 266, in this case.

(2) That Booth does not implicate any large issue of governmental power or direction. Despite Booth, the states can still punish the crime of murder with the penalty of death, utilize procedures for capital sentencing which permit individualized consideration of a defendant's moral culpability, and permit consideration in most cases of virtually all the evidence that any Justice might deem relevant on the issue of culpability. Booth excludes from the capital sentencer's consideration only a very narrow class of evidence whose relevance is at least reasonably debatable. In short, most capital prosecutions would be the same whether or not Booth had been decided. Accordingly, Booth has not in any substantial way

intruded upon the state's exercise of their legitimate powers under the Constitution.

(3) That no major principle of constitutional law, having potential to shape or deform the growth of constitutional doctrine, is implicated in the debate between the majority and the dissent in Booth. Booth involved a particularized application of two settled constitutional principles. While there were reasonable differences between the majority and the dissent over the particular application of these principles in Booth, these differences in no way involved any significant change in the articulation of the principles themselves.

The first principle called forward in Booth is one that was by then well-settled: the individualized selection of

those to be sentenced to death must turn upon an assessment of moral culpability. See Enmund v. Florida, 458 U.S. 782, 798 (1982); Tison v. Arizona, 95 L.Ed.2d 127, 143-45 (1987). While there have been disputes within the Court as to how moral culpability should be measured in particular cases, compare Tison v. Arizona, 95 L.Ed.2d at 143-45, with id., 95 L.Ed.2d at 151-54 (Brennan, J., joined by Marshall, Blackmun, and Stevens, J.J., dissenting), there has been no dispute that the inquiry into moral culpability is the heart of the quest. Indeed, there was no dispute in Booth; rather there was disagreement, as there can be in any particular case, over the application of the principle in that case.

The second principle called forward in Booth was also well-settled: to be reliable the capital sentencing process

must be protected against the influence of arbitrary and capricious factors. See, e.g., Zant v. Stephens, 462 U.S. 862, 884-85, 887 & n.27 (1983); Turner v. Murray, 476 U.S. 28, 36 (1986); Johnson v Mississippi, 100 L.Ed.2d 575, 584-85 (1988). All that was involved in Booth was a very narrow judgment call as to whether a particular kind of evidence fell on one side of this line or the other -- whether victim impact evidence was a relevant or an arbitrary and capricious factor in the assessment of moral culpability.

Accordingly, Booth simply did not involve the articulation of any large constitutional principle having the potential to shape or deform constitutional doctrine. It neither broke new constitutional ground nor declared a well-tilled field infertile. It does not

involve, therefore, the kind of shaping or mis-shaping of constitutional doctrine that may, in some cases, be worthy of intrusion upon the values protected by stare decisis.

(4) That Booth has not been seen as such an aberration that it has caused serious disruption in the administration of the states' capital sentencing schemes. Booth has been cited in a number of reported decisions, but there has been no indication that it has caused any difficulty for the administration of the states' criminal justice systems, nor has it led to wholesale reversals of sentences. Our research has revealed no case other than Gathers in which there was a reversal based on a finding of a Booth violation. In all other cases that we have examined, no Booth violation was found, it was held

that any Booth error was harmless, or there were procedural grounds to reject the Booth-based challenge. See, e.g., State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), cert. denied, 108 S.Ct. 734 (1988); State v. Howard, 293 S.C. 462, 369 S.E.2d 132 (1988).

The plain truth is that the states have accommodated their practices to the mandate of Booth. No state has argued to the Court that Booth has created an imbalance in favor of the defendant in capital sentencing proceedings by its preclusion of victim impact evidence as evidence "counteracting the mitigating evidence which the defendant is entitled to put in...." 96 L.Ed.2d at 457 (White, J., dissenting). No state has filed an amicus brief in support of the petitioner in Gathers, for in truth, the states do not need to use victim impact

evidence to "even the score." The proper and sufficient counter to the defendant's mitigating evidence is for the prosecution to adduce evidence that the defendant's mitigating evidence and arguments are unworthy of belief or that they are exaggerated or defective in some other respect.

For all these reasons, there is no sufficient basis -- in the reasoning of Booth, in any disruption Booth has caused, or in any intervening change in law or society -- for the Court to overrule Booth.

CONCLUSION

Under these circumstances, if the Court overrules Booth it will do considerable damage to the moral fiber of the law. It will appear to be a decision occasioned by nothing more than a change in the Court's personnel. And while

capital cases may be thought to affect only a tiny group of citizens, the process of overruling Booth will signal a threat to all. As Justice Stevens so perceptively counseled,

> Citizens must have confidence that the rules on which they rely in ordering their affairs -- particularly when they are prepared to take issue with those in power in doing so-- are rules of law and not merely the opinion of a small group of men who temporarily occupy high office.

Florida Dept. of Health v. Florida Nursing Home Association, 450 U.S. at 154. We urge the Court to honor the rule of law by refusing to overrule Booth v. Maryland.

Respectfully submitted,

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No. 88-305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF SOUTH CAROLINA,
Petitioner,

vs.

DEMETRIUS GATHERS,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF SOLACE, FRIENDS OF SOLACE, NORMAN FELTON, AND MARY JO GRUCA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-305

State of South Carolina,

Petitioner,

v.

Demetrius Gathers,

Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF SOLACE, FRIENDS OF SOLACE, NORMAN FELTON, AND MARY JO GRUCA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Pursuant to Rule 36.3 of the rules of this Court, amici respectfully request leave to file the attached brief of amici curiae in support of Respondent. Although Respondent has consented to the filing of this brief, due to time

constraints, Amici has been unable to obtain permission to file from Petitioner.

STATEMENT OF INTEREST OF AMICI CURIAE

SOLACE is a membership organization of approximately two hundred individuals, who have had a family member by blood, marriage, or adoption who was murdered, including those killed by drunk drivers. Although the organization is open to relatives of those executed by the state, only a few such persons are currently members. Formed in July 1988, SOLACE is a nationally-based organization headquartered in Atlanta, Georgia. SOLACE was created to serve the needs of families of murder victims, support alternatives to capital punishment, and provide a forum for public education on the needs of murder victims' families and on capital punishment.

FRIENDS OF SOLACE is an organization dedicated to supporting the goals of SOLACE through fundraising and other activities. The organization, which is based in Albany, New York, has approximately three hundred-fifty members and supporters and includes many friends of murder victims.

Norman Felton and Mary Jo Gruca are both relatives of murder victims. Norman Felton's daughter, son-in-law, and nine-month-old granddaughter were murdered in Detroit, Michigan. Three individuals were convicted of the crimes and sentenced to life in prison without the possibility of parole. Throughout the ordeal, Mr. Felton was in contact with the Michigan authorities and in attendance at the trials.

Mary Jo Gruca's brother, Jim Gruca, was killed in the course of a burglary in

October 1983, in Los Angeles County. The murder remains unsolved.

For the foregoing reasons, amici curiae respectfully request leave to file this brief amici curiae in support of Respondent. Amici's participation in this case will provide this Court with important perspectives that we believe will not be otherwise presented.

Dated: January 31, 1989

Respectfully submitted,

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner and Amici in support of Petitioner urge this Court to overrule or severely curtail the holding in Booth v. Maryland, 482 U.S. ___, 107 S. Ct. 2529 (1987). In Booth, this Court held that a death sentencing determination should not be influenced by the constitutionally irrelevant factors of the victim's status in the community and personal characteristics and the effect that the victim's loss had on family members. Id. at 2533. We respectfully submit that this Court correctly interpreted the Eighth Amendment in Booth and that this occasion should not be used to overrule that decision.[1]

---

[1] The instant case questions only the first prong of the Booth decision--whether the victim's status in the community and personal characteristics may influence a death sentence determination. At trial, the State of

First, permitting the prosecution to introduce evidence of or argue a victim's good character to the jury will result in death penalty proceedings dominated by a debate about the character and social worth of the victim. Rather than providing "the jury a quick glimpse of the life [the defendant] chose to extinguish," Mills v. Maryland, 486 U.S. ___, 108 S. Ct. 1860, 1876 (1988) (Rehnquist, C.J., dissenting), the proceedings will degenerate into a parade of the victim's "evil" deeds and human

---

South Carolina did not attempt to present or argue the effect that Mr. Haynes' murder had on his family and friends. Although Petitioner and amici in support of Petitioner requests that Booth be overruled in its entirety, such a sweeping request is untenable as the remainder of the Booth holding is not before the Court. Nevertheless, although this brief addresses only the validity of the first prong of the Booth holding, many of the arguments contained herein equally support the Booth holding with respect to the second prong.

foibles, thus prolonging the suffering of the victim's family and loved ones and distracting the jury's attention from its responsibility to determine whether the death penalty is the appropriate sentence for the defendant.

Second, the "evolving standards of decency" that give meaning to the Eighth Amendment do not permit the State to impose a death sentence because a murder victim's status and personal characteristics are valued by the community. Permitting the State to differentiate the quantity and quality of punishment based on the victim's social worth offends the democratic precepts upon which this society was formed and violates this Court's interpretation of the Eighth Amendment.

ARGUMENT

I.

THIS COURT SHOULD REAFFIRM BOOTH V. MARYLAND TO PREVENT DEATH SENTENCING PROCEEDINGS FROM BECOMING A BATTLE OVER THE SOCIAL WORTH OF MURDER VICTIMS AND PROLONGING THE AGONY OF THE VICTIM'S FAMILY AND FRIENDS

The criminal justice system has long been accused of being unresponsive to and uncaring for the needs of crime victims and their family and friends. See, e.g., Task Force on the Victims of Crimes and Violence, Final Report of the APA Task Force on the Victims of Crime and Violence, 40 Am. Psych. 107 (1985); Gibbons, Victims Again: Survivors Suffer Through Capital Appeals, 74 A.B.A. J. 64 (Sept. 1988). Amici in support of Petitioner assert that overruling Booth would make the criminal justice system more responsive to these needs. See Brief of Amici Curiae of Washington Legal Foundation et al., at 22-30. In

reality, however, victims' families will not be served by permitting the personal characteristics of the victim to influence death sentencing decisions.

A major concern underlying the Booth holding was that introducing a victim's character and social status in the community into a death sentencing proceeding "could well distract the sentencing jury from its constitutionally required task [of] determining whether the death penalty is appropriate in light of the background and record of the accused and the particular circumstances of the crime." 107 S. Ct. at 2535. Given the realities of capital representation, such concerns are substantial.

An overruling of Booth v. Maryland would permit the death sentencing proceeding to become a battle over

whether the loss to society caused by the victim's death justifies the execution of the defendant. Without the clear prohibition against such distracting influences, death penalty proceedings likely will become thoroughly infused with such considerations. The result will have a devastating effect on the families and friends of victims.

Confronted with the prospect of a death sentencing determination influenced by the victim's personal characteristics, a defense attorney, whose responsibility includes a thorough investigation of the prosecution's case, would have to analyze every facet of a victim's life. See, e.g., Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 335 (1983) ("A true advocate cannot permit a capital case to go to the

sentencer on the prosecution's one-sided portrayal alone and claim to be rendering effective assistance."); see also Strickland v. Washington, 466 U.S. 668 (1984).

Moreover, even though investigations may focus on gathering evidence to rebut the State's case in aggravation, a defense attorney might decide to use the victim's "bad" deeds and socially undesirable characteristics. As this Court in Booth recognized, when the state is permitted to introduce such evidence, "the defendant presumably would be permitted to put on evidence that the victim was of dubious moral character, was unpopular, or was ostracized from his family." 107 S. Ct. at 2535. Under the current law in South Carolina, all evidence of the victim's character -- good and bad -- is excluded

from the penalty trial. See State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985). By overruling Booth v. Maryland, this Court would open the door to wholesale attacks by defense attorneys on the character of victims, either to rebut claims made by prosecutors or, independently, as mitigating factors.

Finally, the criminal proceedings, themselves, will be adversely affected. Defense counsel can be expected to use jury selection to determine personal assessments of character. See Turner v. Murray, 476 U.S. 28 (1986). Prospective jurors can expect to be voir dired on their beliefs on a wide range of character traits. Thus, the focus of the penalty trial will be on the victim's family and friends, as they will be called upon to testify to the victim's characteristics. Moreover, rather than

being left with the memory of the victim as a person, the families and friends will be forced to endure a parade of reasons why the victim's death does not justify the death penalty.

Overruling Booth will not redress the failings of the criminal justice system with respect to victims and their families; indeed, the result will be quite the opposite. Throughout the pretrial investigation and the trial, the victim's families will be called upon to provide evidence to both the prosecution and the defense. In effect, they will become the warriors in the battle over the social worth of the victims. In addition, the questions about the victim's social worth and personal characteristics can be expected to last for years, as the specter of ineffective assistance of counsel must be

examined in habeas proceedings. See Burger v. Kemp, 483 U.S. ___, 97 L.Ed.2d 638, 653-58 (1987).

Finally, permitting the appropriateness of the death penalty to be determined by the social worth of the victim will have severe consequences on the victim's family. When society's use of the ultimate penalty is determined by the social worth of the victim, any sentence less than death will be viewed as an indication that society does not value the loss of the victim. Such a prospect is quite likely, if for no other reason than few murders result in a death sentence. See e.g., Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, J.J.). Thus, rather than making the criminal justice system more responsive to victims' needs, overruling Booth will

have the effect of making it less responsive and increase the likelihood that victims' families will resent their treatment.

II.

THIS COURT SHOULD REAFFIRM ITS HOLDING IN BOOTH V. MARYLAND THAT THE EIGHTH AMENDMENT PROHIBITS A STATE FROM USING THE SOCIAL WORTH AND PERSONAL CHARACTERISTICS OF THE MURDER VICTIM TO DETERMINE THE APPROPRIATENESS OF A DEATH SENTENCE.

Amici respectfully submits that the Eighth Amendment does not permit a State to impose the death penalty based on the victim's personal characteristics and status in the community. The democratic traditions upon which our criminal justice system depend long ago discarded notions that a crime victim's social standing should influence a criminal's punishment.

A. EIGHTH AMENDMENT JURISPRUDENCE AND THE BOOTH V. MARYLAND DECISION.

"[O]ne of society's most basic task is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder." Gregg v. Georgia, 428 U.S. at 226 (White, J., concurring). A State may impose the ultimate punishment for certain aggravated murders, but only if the procedures used comply with the Eighth Amendment. Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980) (opinion of Stewart, J.).

In Gregg v. Georgia, this Court held that the death penalty did not violate the Eighth Amendment if the sentencer's "discretion . . . [is] suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

428 U.S. at 189 (plurality opinion of Stewart, Powell, and Stevens, J.J.). Moreover, a sentencer's decision on whether death is appropriate must be guided by "'the circumstances of the offense together with the character and propensities of the offender.'" Id. (quoting Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937)). The case law since Gregg confirms that the Eighth Amendment requires that death sentencing decisions be based on an individualized consideration of the defendant's personal culpability. See Booth, 107 S. Ct. at 2533 ("[T]he jury is required to focus on the defendant as a 'uniquely individual human bein(g).'") (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion of Stewart, Powell, and Stevens, J.J.)); California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J.,

concurring) ("Lockett and Eddings reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant.") (emphasis added).

This Court has consistently recognized that individualized decisionmaking is thwarted when the jury or judge considers factors beyond the defendant's control as reasons to impose death. State procedures must carefully confine the sentencer's discretion to constitutionally relevant factors, as "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). As Justice O'Connor recognized in Caldwell v. Mississippi, 472 U.S. 320, 343 (1985),

death sentencing procedures violate the Constitution if they "creat[e] an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim or mistake'" (quoting California v. Ramos, 463 U.S. 992, 999 (1983)).

In the 1987-1988 Term, this Court, returning to these principles, recognized the unique nature of the death penalty, and reaffirmed the familiar restrictions on unbridled sentencing discretion. In Johnson v. Mississippi, 486 U.S. ___, 108 S. Ct. 1981, 1986 (1988), this Court stated:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "need for reliability in the determination that death is the appropriate punishment" in any capital case. See Gardner v. Florida, 430 U.S. 349, 363-64 (1977) (quoting

> Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (White, J., concurring in judgment)). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,'" we have also made it clear that such decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, 462 U.S. 862, 884-85, 887 n.24 (1983).

"In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds." Mills v. Maryland, 486 U.S. ___, 108 S. Ct. 1860, 1866 (1988). In sum, "[u]nless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground, we must remand for resentencing." Id. at 1867.

In light of these established

principles of Eighth Amendment jurisprudence, this Court's decision in Booth v. Maryland was well-reasoned and correct. Booth held that a death sentencing decision may not be predicated on "personal characteristics of the victims and the emotional impact of the crimes on the family" because such information does not instruct on the defendant's "moral guilt." 107 S. Ct. at 2533. As this Court reasoned,

> [The character and reputation of the victim and the effect on his family] may be wholly unrelated to the blameworthiness of a particular defendant. . . . [T]he defendant often will not know the victim, and therefore will have no knowledge about the existence or characteristics of the victim's family. Moreover, defendants rarely select their victims based on whether the murder will have an effect on anyone other than the person murdered. Allowing the jury to rely on a VIS therefore could result in imposing the death sentence because of factors

> about which the defendant was unaware, and that were irrelevant to the decision to kill. This evidence thus could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime.

Id. at 2534.[2]

This Court explicitly rejected the State's argument that the "emotional trauma suffered by the family and the personal characteristics of the victims" constituted a circumstance of the crime. Id. at 2533. The Court concluded that "this information is irrelevant to a capital sentencing decision, and that its

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[2] Booth recognized, however, that in certain cases, the victim's status might be relevant if the defendant was aware of the personal characteristics or the effect that killing would have on the family and friends, and acted on that awareness. 107 S. Ct. at 2534 ("As we have recognized, a defendant's degree of knowledge of the probable consequences of his actions may increase his moral culpability in a constitutionally significant manner.").

admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." Id.

Booth also based its decision on a second rationale, one that Amici respectfully submits provides an additional compelling reason to reaffirm the holding of that case. This Court held that a death sentencing determination cannot constitutionally "turn on the perception that the victim was a sterling member of the community rather than someone of questionable character. This type of information does not provide a 'principled way to distinguish [cases] in which the death penalty was imposed from the many cases in which it was not.'" Id. at 2534 (quoting Godfrey, 446 U.S. at 433 (opinion of Stewart, J.). The Court

continued:

> We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions. Cf. Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring).

Id. at 2534 n.8. Thus, in reaching its decision, the Court simply applied the principle that the state must accord all murder victims equal human dignity and value in a death sentencing determination.

Similarly, the South Carolina Supreme Court below concluded that evidence of the victim's good character is irrelevant to the sentencing decision. State v. Gathers, 295 S.C. 476, 369 S.E.2d 140, 144, cert. granted, 109 S. Ct. 218 (1988). Significantly, the court

relied on its prior decision in State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985), which held that "evidence of [the] victim's bad character [was] not admissible as mitigating evidence in [the] sentencing phase," Gathers, 368 S.E.2d at 144.

Amici respectfully submit that the two rationales used by the Booth Court and in turn by the South Carolina Supreme Court are compelling. Because the Eighth Amendment derives much of its meaning from the evolution of punishment and principles within our democratic framework and how they relate to the "evolving standards of decency," Amici addresses the second rationale first.

B. THE BOOTH COURT'S INTERPRETATION OF EVOLVING STANDARDS OF DECENCY IS FIRMLY SUPPORTED BY THE HISTORICAL EVOLUTION OF OUR CRIMINAL JUSTICE SYSTEM AND EGALITARIAN PRINCIPLES CONTAINED IN OUR DEMOCRATIC FRAMEWORK THAT kEQUIRE A STATE TO ENSURE THE PROTECTION OF ITS CITIZENS WITHOUT REGARD TO SOCIAL STATUS.

The Booth Court's conclusion that a death sentence should not turn on the social worth of the victim stems from our deep-rooted commitment to social equality. As this Court has consistently recognized, the Eighth Amendment's prohibition on cruel and unusual punishments derives its meaning from "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958); see also McCleskey v. Kemp, 481 U.S. ___, 107 S. Ct. 1756, 1770-71 (1987). The progress of our maturing society, especially "as public opinion [has] become[] enlightened by a human

justice," Weems v. United States, 217 U.S. 349, 378 (1910), has been consistent in the belief that our democratic society is not permitted to dole out police protection and criminal punishment based on the citizen's status in the community.

An inquiry into the "evolving standards of decency" must begin with an examination of the principles upon which our maturing society has been based. The fundamental principle of equality contained in the social contract of governments is that individuals relinquish self-help and vigilante justice to the government in return for society's collective protection.[3] An

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[3] John Locke wrote of individuals' relinquishment of the right to punish when a government is formed:

> [B]ecause no political society can be nor subsist without having in itself the power to preserve the property, and, in

> order thereunto, punish the offences of all those of that society, there, and there only, is political society, where every one of the members hath quitted this natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it; and thus all private judgment of every particular member being excluded, the community comes to be umpire; and by understanding indifferent rules and men authorized by the community for their execution, decides all the differences that may happen between any members of that society concerning any matter of right, and punishes those offences which any member hath committed against the society with such penalties as the law has established; whereby it is easy to discern who are and who are not in political society together.

J. Locke, Second Treatise on Civil Government ¶ 87 (1690); cf. Carter, When Victims Happen to be Black, 97 Yale L.J. 420, 422 (1988) ("If the government cannot or will not protect the people, then the social compact is rent asunder, and people have to protect themselves

integral part of the social contract, as it has evolved in our political philosophy, is the notion that each citizen is entitled to the same protection accorded fellow citizens.

The Anglo-American system of criminal justice long ago accepted the responsibility of collective protection and replaced the system in which the social status of the victim determined the amount of "justice" obtained. Prior to the development of modern criminal law and procedure in the nineteenth century, criminal punishment in England depended upon private prosecutions by victims or their survivors, at first in the field of battle and later in local courts. See T. Plucknett, A Concise History of the Common Law 424-26 (5th ed. 1956).

against the stream of evil pouring through.").

Victims and their families often collected compensation from the offender as the punishment for the crime; even homicide "was a deed that [could] be paid for by money." 2 F. Pollock & F. Maitland, The History of English Law 451 (Cambridge Univ. Press 2d ed. 1968); see also id. at 450 ("The injured kin would avenge its wrong not merely on the person of the slayer, but on his belongings."). Moreover, the punishments meted out differed depending upon the social status of the aggrieved person. See, e.g., id. (The injured kin "would have life or lives for life, for all lives were not equal value; six ceorls must perish to balance the death of one thegn."); 1 F. Pollock & F. Maitland, supra, at 48 (Under Anglo-Saxon criminal law, compensation for homicide, wer, was "the value set on a man's life, increasing

with his rank").[4]

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[4] Even as punishment became a creature of statute, discrimination based on the status of the victim continued. For example, a seventh century statute provided for differing punishment for the crime of rape, depending upon the social worth of the victim:

> A man who "lays with a maiden belonging to the king," for example, had to pay fifty shillings compensation, but if she was "a grinding slave" the compensation was halved. Compensation for lying with a nobleman's serving maid was assessed still lower at twelve shillings and with a commoner's serving maid at six shillings. If a freeman raped the slave of a commoner he had to pay more than five shillings' compensation, but if a slave raped the same girl he was castrated.

C. Hibbert, The Roots of Evil: A Social History of Crime and Punishment 4 (1963).

Status of the victim also had a role in the application of capital punishment. In the fourteenth century, English law provided the death penalty for petty treason, which was the killing of a husband by a wife, but not for a husband killing the wife. T. Plucknett, A Concise History of the Common Law 443

The private system of justice was gradually replaced with common law proceedings, which vested the criminal justice function in the central governmental authority.[5] As criminal punishment was transformed to serve the

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(5th ed. 1956).

[5] Many political philosophers during this time, including Cesare Beccaria, Jeremy Bentham, and John Stuart Mill, convincingly argued that the purpose of punishment must be guided by the society's interests in preventing future crime, rather than redressing the damage inflicted on the individual victims. See J. Hagan, Victims Before the Law: The Organizational Domination of Criminal Law 11 (1983) (An "implication of the utilitarian philosophy of punishment offered by Beccaria and Bentham . . . [is] that victims should play no direct role at all in criminal justice decisions about prosecution and punishment."); see also Gale, Retribution, Punishment, and Death, 18 U.C. Davis L. Rev. 973, 974 n.4 (1985) ("In a representative democracy, which postulates the political equality of its members, an important social institution that enables some members to exert significant power over others is required to have a public rationale.").

collective interests of society, civil tort law served as the vehicle for compensation for crime victims. T. Plucknett, supra, at 422-23, 458. This transferring of authority for criminal punishment from private to public was accompanied by an increasing respect for equality of all persons in the community. See W. Bowers, Legal Homicide: Death as Punishment in America, 1864-1982, at 139 (1984) ("In effect, the economic revolution of the eighteenth century brought about a new balance in English society . . . . The sacredness of property rights, as proclaimed by Locke, was displaced by a new-found reverence for human rights and liberties associated with the Enlightenment -- providing a mandate for the full political incorporation of all citizens, not just the propertied

classes.").[6]

Although the acceptance of enlightenment produced a criminal justice system in which all "persons" were entitled to equal protection by the state, the concept that all human beings were persons was not universally accepted. The most notorious and

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[6] With regard to assigning punishment based on the status of the victim, Cesare Beccaria wrote:

> Others measure crimes rather by the dignity of the injured person than by the importance (of the offense) with respect to the public good. If this were the true measure of crimes, an irreverence toward the Being of beings ought to be more severely punished than the assassination of a monarch, the superiority of nature constituting infinite compensation for the difference in the injury.

Beccaria, On Crimes and Punishments (1764), reprinted in Theories of Punishment 117, 134 (S. Grupp ed. 1971).

prevalent discrimination in criminal punishments in the United States was that based on race. Indeed, until the passage of the Reconstruction Amendments to the U.S. Constitution, state statutes expressly provided for differing punishments depending upon the race of the victim.[7]

Although the enactment of the Reconstruction Amendments provided the means for nullifying statutes that differentiated punishments based on

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[7] Prior to the Reconstruction Amendments, southern States routinely imposed differing punishments depending upon the race of the offender and the race of the victim. See, e.g., A. Higginbotham, In the Matter of Color: Race in the American Legal Process 256 (1978) (differential punishment schemes based on race of victim and race of defendant); see also Ga. Penal Code, Pt. 4., Tit. 1, Div. 4 §§ 4704 (rape of white woman by a black punishable by death), 4249 (rape of a black woman punishable by a fine and imprisonment) (1861), quoted in McCleskey v. Kemp, 107 S. Ct. at 1786 (Brennan, J., dissenting).

victim's race, they proved less effective in removing discrimination from the actual administration of criminal laws in the South. Those who administered criminal justice continued to discriminate based on race and alienage of the victim.[8] The failure to ensure

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[8] That the Civil War did not eliminate discrimination in the administration of police protection is evident by the countless abuses suffered by black persons while southern authorities refused to act. In Monroe v. Pape, 365 U.S. 167 (1961), Justice Douglas quoted the members of Congress who in 1871 spoke of the need for equal protection of the laws for all citizens:

> [Mr. Lowe of Kansas said] "While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice.

that all individuals were entitled to protection of the criminal justice system condemned an entire race to unequal treatment. See D. Bell, Race, Racism and American Law 207 (2d ed. 1980).

The evolution of our criminal

> Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress."

Id. at 175; see also Wilson v. Garcia, 471 U.S. 261, 276-77 (1985); Briscoe v. Lahue, 460 U.S. 325, 336-40 (1983); District of Columbia v. Carter, 409 U.S. 418, 425-29 (1973). Moreover, even when individuals were brought to trial for criminal acts against blacks, they were often acquitted. See C. Woodson & C. Welsey, The Negro in Our History 394 (1922) (citing several cases in which individuals killing blacks were not punished).

To address the refusal or failure of southern authorities to provide legal protection to black persons, Congress enacted a whole host of legislation, which required the federal judiciary -- through civil and criminal proceedings-- to enforce the civil rights of all persons. See D. Bell, Race, Racism and American Law 30-38, 207-30 (2d ed. 1980).

justice framework has thus produced an understanding that police protection and criminal punishment cannot depend on the victim's social worth to the community.[9] Moreover, respect for these principles requires constant vigilance in the application of law: "The moral requirement of equal treatment makes systemic concerns about the operation of the criminal justice system ... morally central." Radin, Proportionality, Subjectivity, and Tragedy, 18 U.C. Davis L. Rev. 1165, 1170 (1985).

Mindful of the evolution of the

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[9] This is not to say that a legislature cannot define criminal liability based on circumstances of the crime and the offender's awareness of those circumstances. For example, a State may constitutional punish the intentionally killing of a police officer in the line of duty where the defendant was aware of the officer's occupation. See, e.g., State v. Glenn, 504 N.E.2d 701 (Ohio 1986).

criminal justice system and our struggle to guarantee the protection of the laws to all persons, the Booth Court was properly troubled when the State of Maryland suggested that a death verdict may turn on whether the victim was a sterling member of society. 107 S. Ct. at 2534. The unyielding march of our civilized society is to rid our country of such discriminatory treatment, and Booth properly concluded that evolving standards of decency, as they define the Eighth Amendment, prohibit such discrimination in selecting those defendants deserving of society's ultimate punishment.

C. PERMITTING THE STATE TO INTRODUCE AND ARGUE A VICTIM'S SOCIAL STATUS AND PERSONAL CHARACTERISTICS FAILS TO PROVIDE MEANINGFUL REASONS FOR IMPOSING THE DEATH SENTENCE AND ALLOWS THE DEATH PENALTY TO BE IMPOSED BECAUSE OF CONSTITUTIONALLY IMPERMISSIBLE AND IRRELEVANT FACTORS.

Even if the Eighth Amendment did not prohibit entirely the use of a victim's social standing, other aspects of the Eighth Amendment's requirements of individualized sentencing and other constitutional provisions require careful scrutiny of a State's use of a victim's personal characteristics as reasons for imposing death. In particular, the factors used in this case -- the religious practices of Mr. Haynes and that he was a registered voter -- fail to comply with strict adherence to constitutional principles.

Although a State is free to adopt its own death penalty sentencing procedures, those procedures "must

channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (citations and footnotes omitted). Moreover, the sentencer is discretion to impose the death sentence must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S. at 189 (opinion of Stewart, Powell, and Stevens, J.J.). The "capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases ir which it is not.'" Godfrey v. Georgia, 446 U.S. at 427-28 (opinion of Stewart, J.) (quoting Gregg v. Georgia, 428 U.S. 153,

188 (1976) (opinion of Stewart, Powell, and Stevens, J.J.) and Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)).

State procedures that permit a sentencer to consider personal characteristics and social standing of the victim fail to comply with Eighth Amendment jurisprudence in two major respects. First, they permit the imposition of the death penalty for reasons that do not meaningfully distinguish between those that deserve to die and those that do not. Second, they permit the imposition of a death sentence for constitutionally impermissible or irrelevant factors.

The procedures below illustrate both defects in a death sentencing scheme that permits the introduction of a victim's personal characteristics. The State of

South Carolina did not determine what aspects of a victim's personal characteristics constitute reasons to impose a death sentence. Rather, the individual prosecutor and the jury were left with unlimited discretion to determine what aspects were relevant and what weight to assign those characteristics.

The prosecutor's argument in this case fully supports the position that using victim characteristics will fail to guide adequately the sentencer's discretion. The prosecutor argued that because Mr. Haynes had registered to vote, the death penalty was the appropriate punishment. State v. Gathers, 369 S.E.2d at 144. The particular defect with the State's position is that this factor does not relate to the defendant's culpability

because registering or not registering to vote does not reveal whether Mr. Haynes was a worthy individual. The State obviously cannot support the view that a person who is not a registered voter is unworthy of societal protection to the fullest extent of the law.[10] Thus, the use of a personal characteristic that reveals no constitutionally significant reason why the death penalty should be imposed fails to distinguish in a meaningful manner.[11]

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[10] Indeed, society has an obligation to protect its members without regard to whether they are eligible to vote. Many members of our society are legally unable to register, e.g., those under eighteen and aliens. Society, of course, must protect these individuals in the same manner as it does those who do register to vote.

[11] The logic of Amici's argument is clearly seen when one examines what a defendant in Mr. Gather's position could do to counter the State's efforts. For example, could a defendant rebut the prosecutor's use of the voter

The defect identified by the prosecutor's use of Mr. Haynes' voter registration card is not unique to that particular aspect of the victim's background. Almost all personal characteristics are capable of supporting the position that the murder of a person was particularly tragic. The critical Eighth Amendment concern is whether the particular aspect of a victim's character used as a reason to death sentence implies the converse -- that is, the absence of such a character trait should be a mitigating factor. To hold otherwise would mean that a death sentence is imposed because of factors universal to all murder cases. See Godfrey, 446 U.S. at 433 ("There is no

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registration cards by showing that the victim, although registered, did not vote?

principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not."); see also McCleskey, 95 L.Ed.2d at 286 (Constitution requires that states have "carefully defined standards that must narrow a sentencer's discretion to impose the death sentence").

Using a victim's personal characteristics also risks a death sentence imposed because of constitutionally impermissible and irrelevant grounds. In upholding the presentation to the jury of a defendant's previous criminal activity as a nonstatutory aggravating circumstance, this Court in Zant v. Stephens, 462 U.S. 862 (1983), expressly stated that consideration of certain factors as aggravating circumstances may violate the Constitution:

> Nor has Georgia attached the "aggravating" label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant, cf. Herndon v. Lowry, 301 U.S. 242 (1937), or to conduct that actually shouid militate in favor of a lesser penalty, such as perhaps the defendant's mental illness. Cf. Miller v. Florida, 373 So. 2d 882, 885-886 (Fla. 1979). If the aggravating circumstance at issue in this case had been invalid for reasons such as these, due process of law would require that the jury's decision to impose death be set aside.

462 U.S. at 885 (emphasis added).

What constitutes an impermissible or irrelevant ground derives from all constitutional principles, including the Eighth Amendment, the Due Process Clause, Equal Protection, the First Amendment. For example, principles embodied in the Equal Protection Clause would prohibit certain aspects of a murder victim's life

to be used in determining punishment. Absent a showing of sufficient governmental interest, the State could not use the following factors as reasons to impose a death sentence: race,[12] ancestry,[13] gender,[14] legitimacy,[15]

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[12] See, e.g., Strauder v. West Virginia, 100 U.S. 303, 307 ("[A]ll persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, ... no discrimination shall be made against them by the law because of their color...."); cf. Linda R.S. v. Richard D., 410 U.S. 614, 621 (1973) (White, J., dissenting) ("If a State were to pass a law that made only the murder of a white person a crime, I would think that Negroes as a class would have sufficient interest to seek a declaration that the law invidiously discriminated against them.").

[13] See, e.g., Loving v. Virginia, 388 U.S. 1, 11 (1967) ("Over the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'") (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

alienage,[16] economic success or standing,[17] and property ownership.[18]

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[14] See, e.g., Orr v. Orr, 440 U.S. 268, 279-80 (1979) (invalidating a state law imposing alimony obligations only on men). But see Michael M. v. Superior Court, 450 U.S. 464 (1981) (statutory rape law protecting teenage girls did not violate equal protection because state justification for discriminatory treatment -- deterring teenage pregnancies -- sufficient).

[15] See, e.g., Trimble v. Gordon, 430 U.S. 762, 773 (1977) (discrimination against illegitimates impermissible because "illegitimate children can affect neither their parents' conduct nor their own status").

[16] See, e.g., Takahashi v. Fish and Game Commission, 334 U.S. 410, 420 (1948) (aliens have the same right to the full and equal benefit of all laws and proceedings).

[17] This Court has unequivocally stated that economic status or achievement is not a constitutionally relevant factor: "We should say now, and in no uncertain terms that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. . . . The mere state of being without funds is a neutral fact--constitutionally an irrelevance, like race, creed, or color." Edwards v.

In a death sentencing context, permitting a prosecutor to argue that a victim's personal characteristics are to be considered by the jury as a "circumstance of the crime" and should be weighed in the sentencing calculus creates a impermissible risk that the sentence will be imposed for constitutionally irrelevant factors. In the instant case, the jury was instructed that it was to consider "the circumstances of the crime" in its decision.

The South Carolina prosecutor's use of Mr. Haynes's particular religious characteristics in urging the jury to return a death sentence is especially

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California, 314 U.S. 160, 184-85 (1941).

[18] Turner v. Fouche, 396 U.S. 346 (1970) (limiting school board membership to those who own property wholly irrational).

troubling. State v. Gathers, 369 S.E.2d at 144 ("These remarks conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter.").

Although the religious practices of a victim determined the amount of punishment during the Feudal Age, the factor is constitutionally irrelevant under our system of criminal justice.[19]

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[19] The victim's religion might be relevant to the death sentencing decision if it was truly relevant as a "circumstance of the crime," -- e.g., because the defendant killed the victim on the basis of his religion. As the Booth Court recognized, victim characteristics may constitutionally enter the weighing process if those characteristics were known to the defendant and influenced his or her conduct during the crime. Booth, 107 S. Ct. at 2534. This is not the case here. Contrary to Petitioner's post-hoc rationalizations, there was no evidence at trial that Respondent was aware of Mr. Haynes' religious proclivities, read the card that Mr. Haynes carried and which the prosecutor read to the jury, or acted on that knowledge.

Indeed, the First Amendment to the U.S. Constitution prohibits the government from discriminating on the basis of one's religious beliefs or non-beliefs. See Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (government may not "pass laws or impose requirements which aid all religions as against nonbelievers"); see also West Virginia State Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion").[20]

Petitioner and Amici in support of

[20] Booth did not have the occasion to examine whether other constitutional principles may prohibit the use of victim characteristics. At least, with respect to the prosecutor's classification based on religious beliefs, Booth's prohibition has constitutional authority apart from Eighth Amendment jurisprudence.

Petitioner contend that Booth v. Maryland removed "harm" as a consideration from the death sentencing determination. Booth did nothing of the kind. The "harm" that is always present in a murder case is that a human being was killed. Booth did not, and could not, remove that fact from the sentencer's consideration. What Booth precluded was the State from attaching differential value to that "harm" depending upon society's assessment of the victim's social worth. What Booth did is require the State to recognize that the murder of any member of our community deserves condemnation, not just the members that society deems worthy of protection.

CONCLUSION

Amici respectfully submits that this case should not be the vehicle to permit the social worth of the victim to

determine whether the death penalty is appropriate and to overrule our democratic traditions.

Respectfully submitted,

MICHAEL LAURENCE*
ACLU FOUNDATION OF
NORTHERN CALIFORNIA

PAUL L. HOFFMAN
JOAN W. HOWARTH
JOHN W. HEILMAN
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA

Attorneys for Amici

*Counsel of Record

default.[3] To reach a contrary conclusion could require the Supreme Court of South Carolina to act in a manner which is inconsistent with century old precedent and places this Court in the partial position of moving to protect the interests of one party litigant when that party has itself neglected to do so. Application of this procedural rule, therefore, could nowise be construed as constituting merely an attempt to "evade review." See Konigsberg v. State Bar of Calif., 366 U.S. 36, 82 S.Ct. 21 (1961); Henry v. Mississippi, supra.

B.

As previously noted Demetrius Gathers has filed a Motion for a Speedy Trial in the court which now has jurisdiction over the matter. Consequently there is no reason why Mr. Gathers cannot be retried at this time and sentenced to life imprisonment. Therefore, any decision rendered by this Court on Petitioner's request for certiorari review would be advisory only on the scope of Eighth Amendment law in that Gathers' death sentence cannot be reinstated absent subject matter jurisdiction in the state Supreme Court. Advisory opinions by this Court are

[3]On this ground cases such as Aetna Casualty Co. v. Flowers, 330 U.S. 464, 67 S.Ct. 798 (1947) can be distinguished. Those cases permit a recall of a federal circuit court remand, and thus do not reach matters of state court jurisdiction.

not favored, North Dakota State Board of Pharmacy v. Snyder's Drugstores, Inc., 414 U.S. 156 (1973); Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 459 (1945), and can encroach upon the plenary powers reserved by the state Supreme Court. Johnson v. Radio Station WOW, 146 Neb.429, 19 N.W.2d 853 (1945). Also see United States v. Fruehauf, 365 U.S. 146, 81 S.Ct. 547 (1961) where this Court refused to give an advanced expression of legal judgment upon issues which remained unfocused. The Eighth Amendment question in the present case is in a similar posture because we do not know at this time the true nature of either the State's theory of the case at resentencing or the evidence to be introduced at that time.

CLARIFICATION OF OPINION

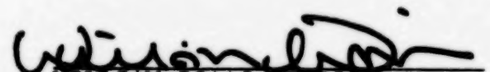
On October 25, 1988, Demetrius Gathers filed a "Motion for Clarification of Opinion" with the Supreme Court of South Carolina. To that motion on November 23, 1988, Petitioner responded that the state Supreme Court lacked jurisdiction to entertain such a request. While this Court may remand a case for clarification of opinion if it cannot readily be discerned whether the opinion rests on application of state law or federal law, Orr v. Orr, 440 U.S. 268, 277 99 S.Ct. 1102, 1110 (1979), we would submit that such a remand by this Court could only be made if the

record shows that certiorari jurisdiction had been established ab initio. As of the date of this motion, the Supreme Court of South Carolina has not ruled on the Motion for Clarification.

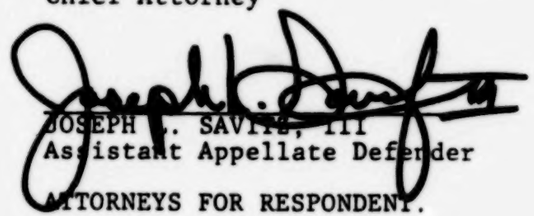
CONCLUSION

WHEREFORE, Demetrius Gathers would respectfully request of this Court that the Petition for Writ of Certiorari be dismissed as improvidently granted as a result of Petitioner's procedural default; in the alternative and subject to the foregoing prayer, we would request that this Court stay the proceeding in this Court and remand the case for clarification, Orr v. Orr, supra; in the alternative and subject to the foregoing, we would request that the Petition for Writ of Certiorari be dismissed without prejudice pending the outcome of Respondent's Motion for Clarification now pending in the state Supreme Court. Southern & Northern, etc., v. Public Utilities Comm. of Calif., supra.

Respectfully submitted,



WILLIAM ISAAC DIGGS
Chief Attorney



JOSEPH L. SAVITZ, III
Assistant Appellate Defender

ATTORNEYS FOR RESPONDENT.

This 7th Day of December, 1988.

EXHIBIT A

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

June 17, 1988

The Honorable Howard A. Taylor
Clerk of Court, Charleston County
P. O. Box 293
Charleston, SC 29401

Re: The State v. Demetrius Gathers

Dear Mr. Taylor:

Enclosed is the remittitur in the above case.

By copy of this letter, all counsel of record are advised of the action of the Court.

Sincerely yours,

Clyde N. Davis, Jr.
CLERK

CND,JR/csl

Enclosure

cc: Joseph L. Savitz, III, Esquire
Joseph F. Kent, Esquire
The Honorable Donald J. Zelenka

EXHIBIT B

STATE OF SOUTH CAROLINA,)
)
COUNTY OF CHARLESTON.)

IN THE COURT OF GENERAL SESSIONS
CASE NO. 88-GS-10-0466

STATE OF SOUTH CAROLINA,)
)
VS.)
)
DEMETRIUS GATHERS,)
)
Defendant.)

MOTION FOR SPEEDY TRIAL

Comes now, Demetrius Gathers, by his Attorney, J. Wescoat Sandlin, moving that he be granted a speedy trial.

J. Wescoat Sandlin
Attorney for Defendant
18 Broad Street, Suite 304
Charleston, S. C. 29401
(803) 723-6559

October 27, 1988

STATE OF SOUTH CAROLINA,)
)
COUNTY OF CHARLESTON.)

IN THE COURT OF GENERAL SESSIONS
CASE NO. 87-GS-10-0417

STATE OF SOUTH CAROLINA,)
)
VS.)
) ACKNOWLEDGMENT OF SERVICE
DEMETRIUS GATHERS,)
)
Defendant.)

Service of a copy of the Motion For Speedy Trial in the above entitled action hereby acknowledged at Charleston, South Carolina, this 31st day of October, 1988.

/s/ Sheila Mottarend
SOLICITOR, NINTH JUDICIAL CIRCUIT

No. 88-305

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RECEIVED
DEC - 9 1988
OFFICE OF THE CLERK
SUPREME COURT, U.S.

STATE OF SOUTH CAROLINA,

PETITIONER,

V.

DEMETRIUS GATHERS,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Motion to Dismiss in the above entitled case has been served upon opposing counsel, Donald J. Zelenka, Chief Deputy Attorney General, by mailing one (1) copy in an envelope properly addressed with postage prepaid this 7th day of December, 1988.

/s/ William Isaac Diggs
WILLIAM ISAAC DIGGS
Chief Attorney

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 7th day of December, 1988.

/s/ Lee B. Hester (L.S.)
Notary Public for South Carolina

My Commission Expires: 1-6-96.

Supreme Court, U.S.
FILED
DEC 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-305

In The
Supreme Court of the United States
October Term, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

vs.

DEMETRIUS GATHERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

JOINT APPENDIX

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(Counsel for Respondent)

* Counsel of Record

Petition for Certiorari Filed August 5, 1988
Certiorari Granted October 11, 1988

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
September 17, 1986	Demetrius Gathers arrested and charged with murder and criminal sexual conduct concerning the death of Richard Haynes on September 13, 1986.
January 12, 1987	Gathers indicted for the offenses of murder and criminal sexual conduct by the Court of General Sessions.
January 14, 1987	State notifies the defendant and counsel of its intention to seek the death penalty.
March 2, 1987	Gathers re-indicted by the Court of General Sessions for the crimes of murder and criminal sexual conduct.
March 16, 1987	Gathers' trial commences before the Honorable Richard E. Fields, Presiding Judge in the Court of General Sessions for Charleston County, South Carolina.
March 20, 1987	Gathers is convicted of murder and criminal conduct in the first degree.
March 21, 1987	Sentencing proceedings held and jury recommends the death penalty and trial court sentences Gathers to the death penalty for murder and thirty (30) years consecutive for criminal sexual conduct in the first degree.
March 30, 1987	Notice of Intent to Appeal to the South Carolina Supreme Court filed.
June 6, 1988	Opinion *State v. Demetrius Gathers* filed by the South Carolina Supreme Court.

August 5, 1988 Petition for Certiorari filed by the State of South Carolina.

October 11, 1988 Petition for Certiorari granted by this Court. -

---

CHARLESTON COUNTY
COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

v.

DEMETRIUS GATHERS

EXCERPTS FROM TRIAL

EXCERPTS OF GUILT PHASE TESTIMONY OF DOROTHY LOUISE HAYNES

(p. 560) DOROTHY LOUISE HAYNES, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Condon:

* * *

(p. 561) Q. And what number child was Ricky Haynes?

A. Fourth.

Q. He was your fourth child?

A. (Nodding affirmatively)

Q. And he went to high school at Middleton, I believe?

A. Wallace and Middleton.

Q. Middleton. And where did he live in September of last year?

A. He lived in the north area on John Street.

Q. How long had he lived there?

A. Almost approximately three months.

Q. Three months?

A. Uh-huh.

Q. And as I understand it he had some odd jobs in September?

A. Yes.

Q. Didn't have regular employment?

A. No.

Q. And he had some mental problems, didn't he?

A. Yes.

(p. 562) Q. And he had been in and out of our mental hospital a few times?

A. Three times.

Q. Three times. When his troubles began—when did his mental troubles begin?

A. Approximately about two years.

Q. About two years ago?

A. Yes, uh huh.

Q. But you never had any problems with him in terms of violence, did you?

A. No.

Q. And he—directing your attention to September of last year, on that Saturday night.

A. Yes.

Q. You saw him that Saturday, didn't you?

A. Yes.

Q. What time did he come to your home?

A. He came to my house about twenty minutes to nine.

Q. Twenty minutes to nine?

A. Uh huh.

Q. And did he have anything with him when he came to visit you?

A. Yes, he had a bag, and he set it down in the . . .

Q. Now you called him Ricky, didn't you?

A. Ricky, yes.

(p. 563) Q. And he was a religious person, wasn't he?

A. Yes, he was.

Q. Tell us about that.

A. He got saved about three years ago, before he got really in this mental problem. And after that he got sort of mentally disturbed—I am sorry, before that—and he came to the Lord, and he loved the Lord.

Q. Did he often carry his religious items—

A. He carry his religious item, his Bible; and he talks to people all the time about the Lord.

Q. He was sort of a preacher, wasn't he?

A. Yes, he was.

Q. And did he give himself a title?

A. Yes.

Q. Called himself Reverend Minister?

A. Right.

Q. But he had no formal religious training, did he?

A. No, not really.

Q. Did he have a church?

A. Yes, he was at my church and also at Bethel Pentecostal Holiness.

Q. Was he married or unmarried?

A. Unmarried.

Q. Did you have any knowledge of him being a homosexual in any way?

(p. 564) A. No, he was not.

Q. And on that night you said he got to your home about twenty minutes to nine?

A. Yes.

Q. How close is your home to the bike pathway?

A. I will say about probably five hundred yards.

Q. Very close?

A. Yes.

Q. Five hundred yards?

A. Yes.

Q. And did he have occasion on that night to leave?

A. Yes.

Q. About what time did he leave?

A. He leave my house about—it was about 10:15.

Q. At night?

A. Yes, uh huh.

Q. And did he say where he was going?

A. No. I tried to get him to stay, and he said he was going. And—

Q. Did you have the impression he was coming back or going away?

A. Yes. He told me, said he was going but he wasn't going home, so I thought well he would just go, like he liked to wander around, and come back. That is what he usually does.

(p. 565) Q. Did he take his belongings with him?

A. Yes.

Q. Did he have occasion to refer to money in any way?

A. Well, yes, but he didn't have any that night.

Q. Did you lend him some money?

A. Yes, I give him five dollars.

Q. Was that five single dollar bills or one—

A. No, it was one five dollars bill.

Q. And, of course, he didn't come back that night?

A. No, he didn't.

Q. And what time were you notified?

A. This was about three o'clock in the morning.

Q. Three o'clock? That would be Sunday morning?

A. Yes.

Q. I want to show you a few items here. Your Honor, I believe these would be basically without objection at this point.

Mr. Kent: That is true, Your Honor.

By Mr. Condon:

Q. State's Exhibit Number 7?

A. Yes.

Q. Is that—

A. All both.

Q. And State's Exhibit Number 10?

A. Yes.

(p. 566) Q. These are Ricky's Bibles?

A. Yes.

Mr. Condon: Your Honor, I want to move these into evidence at this time.

The Court: Admitted without objection, appropriately marked, State's exhibit.

(Thereupon, the items previously marked as State's Exhibits 7 and 10 were received into evidence.)

By Mr. Condon:

Q. And, Mrs. Haynes, State's Exhibit Number 8, do you recognize that?

A. Yes. That is olive oil, what he used to annoint people and pray for them.

Q. Used to annoint people and pray for them?

A. Yes.

Q. That is what Reverend Minister Haynes had?

A. Yes.

Q. He carried that with him?

A. Yes.

Q. And State's Exhibit Number 9, which appears to be a sheet? Do you recognize that, Mrs. Haynes?

A. That is his.

Q. That is Ricky's sheet?

A. Yes.

Q. And he carried this with him on that night?
(p. 567)

A. Well I didn't know what he had in the bag, but I know that is his things.

Q. I understand. So you didn't know what he had in the bag when he was leaving—

A. Right, I didn't know—

Q. —but that was a sheet he would normally have?

A. Yes. Yes.

Mr. Condon: Your Honor, I would like to move both of these into evidence.

The Court: Admitted without objection, appropriately marked, State's exhibit.

(Thereupon, the items previously marked as State's Exhibits 8 and 9 were received into evidence.)

By Mr. Condon:

Q. Now, Mrs. Haynes, do you know the defendant, Demetrius Gathers?

A. No, I don't.

Q. And your son was thirty-one years of age—

A. Yes.

Q. —when he was killed?

A. Yes.

• • •

(p. 568) By Mr. Kent:

• • •

Q. Oh. What was he wearing when you last saw him, Mrs. Haynes.

A. Light-colored shirt and black pants.

Q. Were they regular trousers?

A. Yes, uh huh.

Q. Do you know if he had any other clothing with him?

A. No. I didn't look in his bag. Except I know those is his things that is up here.

• • •

EXCERPTS OF THE TESTIMONY OF ESDAVAN DUVAL HARDRICK

• • •

(p. 573) Q. So it was you, Demetrius, Zandell and Ron?

A. Ron had left and went home.

Q. What time did he go home?

A. Well I will say it was about five then.

Q. What were y'all doing, just bumming around, or what?

A. Yes.

Q. Were you drinking?

A. No.

Q. And Ron went home about five?

A. Yes.

Q. Tell us about this bike path. Have you been on that bike path before?

A. Yes, sir.

Q. What is it like?

A. Well it's just a long bike path running from Wappoo Road all the way down to Highway 61. You know, people just walk up down there, walk up or jog or ride their bike.

Q. How far away is that bike path from your home?

A. Not very far. I live almost by Forest Park, and the bike path is right next to Forest Park.

(p. 574) Q. All right. Five or six o'clock what were you doing?

A. By six o'clock, me and Demetrius and Zandell been together, and we walked over to the park, Forest Park.

Q. Where is Forest Park?

A. That is located on Playground Road right next to the bike path.

Q. Right next to the bike path?

A. Uh huh.

Q. What did y'all do there?

A. Well, we sat out on the park for a little while with this other guy, and then from there we walked back down to the bike path.

Q. What time was that?

A. I don't know. It was about 6:30 at this time, I guess.

Q. What were you doing, walking?

A. Yes.

Q. Then what did you do?

A. Well after we got to the bike path we met up with Dyonzoria.

Q. Dyonzoria?

A. Yeah.

Q. Did you also call him Dee Brown or Dondrell Brown?

A. Dee Brown.

Q. And what time did you meet up with him?

(p. 575) A. It would have to be about 6:30 or 7:00 then.

Q. Was it dark at this time?

A. No, it wasn't dark.

Q. What did y'all do?

A. Well we walked around for quite some time.

Q. Anybody have a radio?

A. Yeah, I had a radio.

Q. What kind of radio was it?

A. It was kind of a small radio, not very large.

• • •

Q. Anybody have an umbrella?

A. Yes. Dyonzoria was walking with his umbrella.

• • •

Q. Steven, I want to hand you what is marked State's Exhibit 6 for identification purposes at this point. Do you recognize this umbrella?

A. Yes, sir.

Q. What umbrella is this?

A. This was the umbrella that Dyonzoria was walking with.

• • •

Mr. Condon: Your Honor, I want to move this (p. 576) into evidence at this time.

The Court: Without objection?

Mr. Kent: No objection.

The Court: Admitted, appropriately marked, State's Exhibit.

(Thereupon, the umbrella previously marked as State's Exhibit 6 was received in evidence.)

By Mr. Condon:

Q. Okay. Was this seven o'clock?

A. About seven o'clock.

Q. And where did y'all go?

A. Well from there we walked around in Ardmore. We walked over to Sequoia Apartments.

• • •

Q. What did y'all do there?

A. We talked to some guys there.

Q. How long did that last?

A. About five or ten minutes at the most.

Q. And who was with you?

A. It was me, Dyonzoria, Zandell Hayes and Demetrius.

• • •

(p. 577) Q. What happened?

A. From there we walked around. Then we went back over to the Majik Market out there by the 20th Century Fox. We was out there for about ten minutes.

Q. You went to the Majik Market by 20th Century Fox?

A. Yes.

Q. What is the 20th Century Fox?

A. That is a club.

Q. Where is that located?

A. On Highway 61.

Q. And the Majik Market is next to it?

A. Yes, sir.

Q. How far away is that spot from the bike path?

A. That is a good deal away from there. I can't say how far, though.

Q. Went by foot?

A. Yes.

Q. What did you do there at the Majik Market and 20th Century Fox?

A. Well we sat out there for a little while, you know. And then from there we went back to the bike path. When we left the bike path we went over to the Beer Barn, which is now called—

Q. Went where now? To the Beer Barn?

A. Yes.

(p. 578) Q. Where is that located?

A. That's located on Highway 17.

Q. Highway 17? So you went from Highway 61 to Highway 17, the four of you?

A. Yes, sir.

Q. How long did that take you to get there?

A. About twenty minutes or thirty minutes.

Q. You went to the Beer Barn?

A. Yes.

Q. Did you buy beer there?

A. Yes, sir.

• • •

Q. How much did you buy?

A. A twelve-pack.

Q. What happened after that?

A. Well from there we went back down to the bike path, where we had met up with Mr. Haynes.

Q. All right. What time, about, did you leave the Beer Barn?

A. At this time it would have been about eight or nine.

• • •

(p. 579) Q. Were you drinking beer along the way?

A. Yes.

Q. Who bought the beer?

A. We got someone to buy the beer for us, but Dyonzoria went with him.

Q. Who paid for it?

A. Me and Zandell had some money. We kind of like pitched in together.

Q. How many beers did you drink before you got back to the bike path?

A. About one.

• • •

Q. And you say you got up with Ricky Haynes, is that your testimony?

A. Yes.

Q. Do you know Ricky Haynes?

A. No, I do not.

• • •

Q. And where was he when you first saw him?

A. He was standing by the bench on the bike path.

• • •

(p. 580) Q. What was he doing?

• • •

Q. What was the lighting like? Was it dark or light?

A. It was dark out there.

Q. Dark out there? And when you got near Ricky Haynes, what was he doing?

A. It looked like he was changing clothing to me.

Q. You say it looked like he was changing clothing. Can you explain that, please?

A. Well because it looked like he was pulling up his pants at the time.

Q. Did he pull up his pants?

A. Yes.

Q. After he pulled up his pants what did Ricky Haynes do?

(p. 581) A. He sat back on the bench.

Q. How big was he?

A. Not very big.

• • •

Q. When he sat back on the bench what did y'all do?

A. When he came up to him, all of us told him hi, hello. Then we sat down next to him. And we started drinking our beer. We had the radio on at the time. And then Demetrius was talking to the guy, and he said that he didn't want to talk to him at the time.

Q. Who said that?

A. Mr. Haynes.

Q. What was Demetrius saying to him?

A. I don't know. I did not overhear it.

Q. What happened?

A. Well after that I believe Demetrius struck the man with his fist.

Q. You say you believe he did?

A. Well he did.

Q. What did you see?

A. I saw him hit the man with his fist.

Q. Where were you at this time?

A. I was sitting on the other end of the bench.

Q. How long was the bench?

(p. 582) A. Not very long. I guess a little longer than this right here. (Indicating)

Q. About four feet?

A. Yes.

Q. Where was Zandell Hayes?

A. He was standing more or less like on the side of the man.

Q. Where was Dyonzoria Brown?

A. He was sitting like next to me.

Q. Right next to you?

A. Yes.

Q. So two of you are on the bench next to Ricky Haynes?

A. (Nodding affirmatively)

Q. Zandell was behind him?

A. Yes.

Q. And your testimony is Demetrius Gathers struck him in the face with a fist?

A. Yes, sir.

Q. Where did he hit him in his face?

A. I guess about in his mouth.

Q. Excuse me?

A. In his mouth.

Q. What happened?

A. Well he fell back. When he fell back, he fell more (p. 583) or less into Zandell Hayes. And at that time he went wild.

Q. Who went wild?

A. Mr. Haynes.

Q. What happened?

A. After that, Zandell Hayes had hit the man.

Q. How did Zandell Hayes hit the man?

A. Hit him with his fist.

Q. Where?

A. I believe in his face.

Q. What happened next?

A. Then he kind of like moved up the bike path, and him and Demetrius was fighting.

Q. Who moved up the bike path?

A. Mr. Haynes.

Q. How did he move?

A. They were more or less tussling up the bike path.

Q. Who was tussling?

A. Mr. Haynes and Demetrius.

Q. How far away did they go up the bike path?

A. Not very far up the bike path. Let me see. I can't recall how far it was.

Q. Over ten yards?

A. It could have been about ten yards, yes.

Q. This would have been Demetrius Gathers and Ricky (p. 584) Haynes tussling?

A. Yes, sir.

Q. Explain that. How were they tussling?

A. Well they were fighting, and Mr. Haynes was backing up, and then they kind of like hooked up together, and they were like rolling on the ground.

Q. What was Zandell Hayes doing?

A. He was over there with me at the time.

Q. What was Dyonzoria Brown doing?

A. He was over there with me at the time.

Q. What happened next?

A. After he had pinned the guy, Mr. Haynes, on the ground, that is when Dyonzoria went over there. And I believe he hit the guy. He hit the guy a couple of times.

Q. How did he hit him?

A. He hit him with his foot and with his fist.

Q. Where did he kick him?

A. In his ribs.

Q. Where did he hit him with his fist?

A. Probably about the same place.

Q. In his ribs?

A. (Nodding affirmatively)

Q. How many blows at that time?

A. I don't know. I couldn't say.

(p. 585) Q. What happened next?

A. Well then after that Dyonzoria had got a bottle, and he struck the guy in the head with the bottle, twice.

Q. How far away were you at this time?

A. I was still by the bench, about—

Q. You can estimate about ten yards?

A. Ten yards.

Q. What happened next?

A. Then Demetrius had picked up a bottle, and he hit the guy with the bottle until it finally broke, which was about three times.

Q. Same bottle or a different bottle?

A. Same bottle.

Q. Was Ricky Hayes saying anything?

A. I believe he was saying, "Oh, Lord".

Q. You say you believe he was saying "Oh, Lord". What was he saying?

A. That is what it sounded like to me, "Oh, Lord".

Q. How many times did he say that?

A. About twice.

Q. After the bottle was broken over his head what happened?

A. Well I believe he was unconscious down there because he wasn't moving, and that is when I went over to him and kind of like nudged him with my foot to see if he was all (p. 586) right. At this time me and Mr. Hayes told them let's go. So we walked back into the middle of the path going to Starcastle Apartments, and that is when Dyonzoria had joined up with us. As we were walking

through there we could look back and see the bike path and see that Demetrius and the guy—well Demetrius was still hitting the guy—

* * *

Q. What about the Starcastle Apartments, where were they?

A. That is right—like on the side of the bike path. There is some woods between the bike path and the Starcastle Apartments.

Q. You say that Zandell Hayes and Dyonzoria Brown were with you?

A. We were in the middle of the path.

Q. Going to Starcastle?

A. Yes, on our way to Starcastle.

Q. And your testimony is you looked back?

A. Uh huh.

(p. 587) Q. And you saw what?

A. He was still hitting the guy.

Q. Who was?

A. Demetrius.

Q. How was he hitting him?

A. He was hitting him with the umbrella at this time.

Q. Hitting him with the umbrella?

A. Uh huh.

Q. How did he get that umbrella?

A. Well when Dyonzoria had went to the store he left the umbrella with him.

Q. Left it with who?

A. Demetrius.

Q. At the store?

A. Yes.

Q. Which store?

A. The Beer Barn.

Q. So at that point in time Demetrius got the umbrella?

A. Yes.

Q. And you say he was hitting Ricky Haynes with the umbrella?

A. Yes, sir.

Q. What was Ricky Haynes doing when this happened?

A. He wasn't doing nothing. I believe he was unconscious at the time.

(p. 588) Q. Did he have his clothing on?

A. Yes.

Q. Where was he hitting him with the umbrella?

A. Well he was more or less on his stomach, on his face, at the time; and I believe he was hitting him with the handle part—well he was hitting him with the handle part—and about in his back and his head. Upper part of his back.

Q. So you say he was hitting him with the handle part, meaning he was using this end?

A. Yes.

Q. How far away were you when you saw this?

A. By this time about twenty yards, in the middle of bike path.

Q. What happened next?

A. Well the guy's pants was like not all the way up. It was like, you know, about to his thighs. And then that is when he had got the umbrella and stuck that up the man's behind.

Q. Who did that?

A. Demetrius.

Q. What end did he use?

A. Used the top end of the umbrella.

Q. You mean the white end?

A. Uh huh.

(p. 589) Q. And did you see Demetrius Gathers pull down or touch the clothing of Ricky Haynes?

A. I can't recall that.

Q. How long, if you can say, did he use this umbrella?

A. About three minutes, I guess. Three minutes at the most, three to five.

• • •

Q. Did you hear any noise from Ricky Haynes?

A. I believe he was groaning at the time.

Q. Was it a loud groan or a low groan?

A. A low.

Q. How far away was Ricky Haynes at this point from the park bench?

A. About ten or fifteen yards.

• • •

Q. What did Demetrius Gathers do after he used this umbrella?

A. After that, you know, we called him and tell him let's go. Then we were walking to the Starcastle Apartments, and after we had got out the path that is (p. 590) when he ran and rejoined up with us.

Q. He rejoined up with y'all, is that what you are saying?

A. Yes.

Q. Who was with you at this time?

A. It was Dyonzoria, Demetrius, Zandell and myself.

Q. And you went to the Starcastle Apartments?

A. Yes, we did.

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(p. 591) Q. When you first came upon Ricky Haynes did he have any items out?

A. Yes he had a Bible And some paper.

Q. What was he doing with that?

A. It was just sitting on the bench.

(p. 592) Q. A Bible?

A. Uh huh.

Q. Did you have occasion to go through any of his belongings?

A. Yes, I did.

Q. What did you do?

A. I looked through the bag, through his bags.

Q. Looking for something to steal?

A. Yes.

Q. Did Demetrius Gathers go through his belongings?

A. Yes, he did.

Q. What did he do?

A. Well when he went through his belongings he started throwing things about, just throwing them everywhere, looking through things.

Q. When did he go through his belongings?

A. Right after I did.

Q. Where was Ricky Haynes when this happened?

A. He was still on the ground.

Q. Anybody touching him?

A. No, not at that time.

Q. And at what point did Demetrius go through his belongings?

A. Well it was like, after I had gone over there and nudged the guy to see if he was all right, at that point.

(p. 593) Q. So before the umbrella?

A. Yes.

Q. How long did it take Demetrius to go through his belongings?

A. Not very long. About a minute at the most.

Q. Then he went back to him with the umbrella?

A. Yes, he did.

Q. And hit him over the head?

A. Yes, sir.

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(p. 596) Q. So you are saying all four of you were going back to the bike path? Is that right?

A. Yes.

Q. Why were you going back to the bike path?

A. Well he went back—we was going back to the bike path—we were going back there—I can't really say.

Q. Where did you go?

A. Well after we turned around, me and Dyonzoria, we went back to Rosemary's house.

Q. You and Dyonzoria went back to Rosemary's house?

A. (Nodding affirmatively)

Q. Did you enter that path to go to the bike path?

A. No, we didn't enter it.

Q. You got near it?

A. Yes.

Q. You went back to Rose's house?

A. Yes.

Q. Who had the knife at this time?

A. Dyonz—Demetrius.

Q. And who went with him back to the bike path?

A. Well, right before we had ran back I believe that Mr. Hayes had already went back there.

Q. Mr. Hayes, who is that?

A. Zandell.

Q. Zandell Hayes. You call him Zan, don't you?

(p. 597) A. Yes.

Q. He is your good friend, isn't he?

A. Yes, he is a good friend.

Q. All right, what happened?

A. After that, me and Dyonzoria were still up there at Rose's house. Then Mr. Hayes came back there with us.

Q. You don't call him Mr. Hayes, do you?

A. Well, Zan.

Q. You call him Zan. What happened?

A. After that, that is when Dyonz—Demetrius had came back to the house.

Q. Zandell was on that bike path with him, too, wasn't he?

A. Yes, he was on there.

Q. Both of them went out there?

A. Well Zandell had went a little before him.

Q. Zandell went before him?

A. Yes.

Q. Out to the bike path? And you say Demetrius had the knife?

A. Yes.

Q. How long were they out there on that bike path?

A. Well from the time that we—me, Dyonzoria and Demetrius went out there, Zandell was out there probably about a minute by himself; and when me and Dyonzoria (p. 598) turned around, he came back in about two minutes. And Demetrius was still out there.

Q. When did Demetrius rejoin you?

A. About three to five minutes after we had went back to Rose's house.

Q. You weren't on that bike path a second time, were you?

A. No, I wasn't.

Q. What did Demetrius tell you about what happened on the bike path when he went out there the second time?

A. Well when he had came back he said that he had stabbed the guy.

Q. He told you that?

A. Yes.

• • •

(p. 600) Q. Now back at the Starcastle, about what time are we talking about when Demetrius went back with Zandell on the bike path? About what time?

A. About 9:30 or 10:00.

Q. Could it be later?

A. I don't think it was later.

Q. And you say that Demetrius was on that bike path a little bit longer than Zandell?

A. Zandell was out there a little bit longer than he was.

CROSS-EXAMINATION BY MR. KENT

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(p. 623) Q. Thank you. I believe you stated in one of these statements that you guys generally hang out at this bench?

A. Yes, we do.

Q. Do a lot of drinking there?

A. Yes.

Q. Do a lot of marijuana there?

A. Yes, we do.

• • •

(p. 629) Q. And you come up to this bench, and there is Mr. Haynes?

A. Yes.

Q. And he apparently is changing clothes?

A. Yes.

Q. His trousers are not all the way up?

A. No they weren't. He was on the verge of pulling them up.

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(p. 631) Q. What were you all doing while you are drinking all this beer there at the bench?

A. Listening to the radio.

Q. Did you talk to Mr. Haynes?

A. We told him hello.

Q. Anybody else talk to Mr. Haynes other than that?

A. Well Demetrius was talking to him, and he said that he didn't feel like talking to him.

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(p. 633) Q. Are you sure—as you sat there listening to the radio with Mr. Brown between you and Richard Haynes, are you sure who punched Mr. Haynes first?

A. Yes, I was.

Q. And you were talking to Zan Hayes at the time this happened?

A. I was talking to Dee Brown at the time.

Q. Mr. Haynes goes to the ground with the first punch?

A. When Demetrius had hit him, he fell back into Zandell.

• • •

(p. 634) Q. But Dee Brown gets up?

A. Yes, he did.

Q. And he joins into the tussle?

A. Not right then. After Demetrius had already pinned the guy on the ground.

Q. Now did Demetrius pin Richard Haynes on the ground right there by the bench?

A. No, he didn't.

Q. It was on up the path some?

A. Yes, it was.

Q. I believe you have testified about ten yards?

A. Yes.

• • •

Q. About that distance? Once Demetrius is fighting with Richard Haynes on the ground, that is when Dee Brown gets into it?

A. Yes, he does.

(p. 635) Q. And then he comes over and hits this man with the bottle?

A. He kicked him a couple of times first.

Q. He kicked him first?

A. Uh huh.

Q. Where did he kick him?

A. Along the ribs.

Q. Did the man resist after that? Or do you remember?

A. He was on the ground. He was pinned. He couldn't do anything.

Q. You were also separated from him by thirty or so feet, ten yards?

A. (Nodding affirmatively)

Q. And three men. Isn't that right?

A. Yes.

Q. And Zan, Demetrius and Dee Brown are all around this fellow when this is going on, isn't that correct?

A. Yes, it was.

Q. And you remained on the bench, is that right?

A. Yes, it is.

Q. This didn't bother you, either?

A. It had bothered me, but I couldn't do much about it.

Q. But you stayed right there, is that right?

A. I moved after Dyonzoria had hit the guy in the head with the bottle a couple times, and Demetrius, to check (p. 636) and see if he was all right.

Q. Was that before or after you went into his belongings.

A. That was right before.

Q. Right before. So you also assured yourself that he was disabled before you went into his bag of belongings, isn't that right?

A. He was unconscious, yes, he was.

Q. You knew that. Is that right?

A. No, I didn't at the time. He was groaning.

Q. This man had two bags of belongings, do you remember?

A. Yes, he did.

Q. Okay. Did you go into either of them while these three fellows are beating on Mr. Haynes?

A. I looked in the bag.

Q. Didn't you see anything you liked?

A. No, I didn't.

Q. Now they stop beating him at some point, correct?

A. Yes, they do.

Q. And it's at that point that you say Demetrius Gathers jabbed this man in the behind with the umbrella?

A. Well at the point that he did that I was in the path.

Q. You were in the path?

(p. 637) A. (Nodding affirmatively)

Q. You had already started to go along with—who, Dee Brown?

A. And Zandell.

Q. And you were a ways into the path?

A. We were like in the middle of the path.

Q. In the middle? Where was this man's body located at that point?

A. About ten yards.

Q. Up away from the bench?

A. Yes.

Q. Did you testify, sir, that Demetrius Gathers probed this man with the tip of his umbrella in his behind for two or three minutes?

A. Well he didn't do that for two or three minutes, but he was beating the man with the umbrella for about that long.

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(p. 649) Q. Zandell definitely did have the knife on the way to McNeal's right after he had come from the bike path and had been there alone for some time, isn't that correct?

A. Well from the bike path, when Demetrius came back, he had the knife; and he told us that he had stabbed the man. He showed the knife to us.

Q. Mr. Hayes?

A. No, Demetrius.

Q. You did not see the knife?

A. He shown it to us when he said that.

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CLOSING ARGUMENT OF SOLICITOR CHARLES M. CONDON

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(p. 1201) Mr. Condon: On behalf of the Haynes Family, on behalf of the people who have been here, I'm sure on behalf of the defendant himself, we thank you for your close attention.

At this stage of the proceeding your duty at (p. 1202) this point becomes to decide the appropriate punishment for the murder of Richard Allen Haynes. And His Honor will instruct you on the applicable law in South Carolina, and I want to briefly go through that with you, if I might.

You are to weigh, in coming to your decision, the mitigating circumstances—that is the circumstances that lessen the severity of this murder—as well as the aggravating circumstances—that is those circumstances that make it worse. Before a death sentence can be imposed in this state the jury must find beyond a reasonable doubt the existence of an aggravating circumstance. In this case we rely on the aggravating circumstance of criminal sexual conduct in the first degree. You have found him guilty of that beyond a reasonable doubt, and that has in effect been decided although you have to make a further finding at this point, and we rely on that circumstance.

Once that circumstance is found the mitigating circumstances have to be considered. If you do find mitigating circumstances—and that is circumstances that will lessen the severity of this murder—the death penalty can still be imposed.

Let's go through the mitigating circumstances (p. 1203) that the defendant relies upon in this case. His Honor will instruct you that one of the mitigating circumstances or a circumstance that they think lessens the severity of this murder is the age or mentality of the defendant. Well the proof has been very clear. He is nineteen years of age. He has family that loves him. No evidence of any mental disease or defect. Knows what is going on. Able to go through school.

Now there has been some talk here of: This is a young man feeling his oats. Or boys, I think that was the term. Well you tell Richard Allen Haynes about these boys out there on that bike path. He knows what he is doing.

They also talk about the lack of the capacity of the defendant to conform his conduct to the requirements of law. He has full capacity to do that. He chooses not to. Look at his record.

They also say the defendant was under the influence of mental or emotional disturbance. The only disturbance that this defendant had on that night was that he was disturbed that he got blood on his shirt and he had to change that before he went to the nightclub.

And they talk about another mitigating or a (p. 1204) circumstance that lessens the severity of this murder is the fact that he doesn't have any prior convictions involving the significant use of violence against other people. Well you can look at his record. He has been through the system. Let's look at the totality of the circumstances in this case. You will have these exhibits. Look at them again.

Oh, and how not to decide this case. His Honor is going to charge you, and of course it only makes common

sense, in terms of being comfortable with your verdict and proud of it, I would be the first to say that this is not an easy procedure whatsoever. No one takes any comfort or any pleasure whatsoever in sentencing anyone to die.

It's your responsibility in this case to make this decision. It's not a easy one. But you have all stated under oath in the pretrial part of this trial that if the facts and the circumstances warranted it and the law allowed it you could vote for and sign your name to a document calling for the death penalty. This is the case. It's not even close.

And look at the evidence. This defendant, Demetrius Gathers—and if you were to decide this (p. 1205) case based on sympathy—and, of course, that is not the way to do it—but looking at Reverend Minister Haynes and his family and his situation, you would sentence this defendant to death in a minute. But you don't do it that way. You look at the mitigating and aggravating circumstances. You look at the individual characteristics of this defendant and the crime. Let's look at that.

First of all, this is State's Exhibit Number 38, the home of Demetrius Gathers. Middle class home. He has got a roof over his head. Schooling provided to him. Teachers, very impressive teacher. Family members that care for him. No talk here of being forced into stealing for the sake of getting money for food.

Look at that night. This defendant had money. Go looking to buy marijuana. They go and in fact buy alcohol. He has got a home. What does he choose to do? Goes to a nightclub. Has money for a nightclub. Those characteristics. It doesn't stop there, doesn't stop there by any

means. You can talk in terms of his prior record. You are aware of those. Family Court. Court of General Sessions. And now he is before you for a most heinous act.

And look in terms of what happened out there on (p. 1206) that bike path. Reverend Minister Richard Allen Haynes was at his parents' home. Dorothy Haynes, Jesse Haynes. And he decides to go for a walk. This defendant, drinking his beer, comes upon him, with others. Reverend Minister Richard Allen Haynes has his Bible out, sitting on a park bench in our county, in our community, at a place where he had every right to be, and he chooses not to talk to this defendant.

What ensued is hard to believe and to describe, but you have heard the testimony. An attack begins that happens in this country, in this community, and while Reverend Minister Haynes begs for mercy—Lord no, Lord no —the degradation continues. The circumstances of aggravation in this case are overwhelming.

Under your responsibilty, under our law, and weighing the mitigating and aggravating circumstances, the verdict in this case, the decision, must be death.

And you will have this instrument of torture and pain. And when the defendant talks about him being a young man and feeling his oats, not knowing any better, you tell Ricky Allen Haynes, when this instrument was in his private body part, that this (p. 1207) defendants was a young man who didn't know what he was doing.

And as his life fluids seeped out onto our public park, and as he was losing consciousness and with the pain shooting throughout his body, you tell Reverend Minister

Richard Allen Haynes that this defendant was feeling his oats, was acting wild and crazy, and this was a high school prank. And it doesn't stop there.

After using that instrument he goes and socializes and goes back. The depravity, the premeditation, the willfulness, the wantonness. An animal would have gotten more mercy. He goes back and with a knife stabs Reverend Minister Haynes in his abdomen. And with little thought, with no thought, as to Reverend Haynes' rights, as to Reverend Haynes' family, goes back and goes to the 20th Century Fox nightclub. Goes to sleep that night. I am sure he slept very peacefully because there was no concern to him of this atrocity.

And you will have the exhibits to think about what happened out there. You will have some exhibits in there that will tell you, tell you what your decision must be in this case, although it's not pleasant. We know from the proof that Reverend (p. 1208) Minister Haynes was a religious person. He had his religious items out there. This defendant strewn them across the bike path, thinking nothing of that.

Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had this religious items, his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers could care little about the fact that he is a religious person. Cared little of the pain and agony he inflicted upon a person who is trying to enjoy one of our public parks.

But look at Reverend Minister Haynes' prayer. It's called the Game Guy's Prayer. "Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this lineup. Play me anywhere you need me. I only ask for the stuff to give you one hundred percent of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anthing come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks (p. 1209) and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me to always play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frameup or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life."

Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune.

And he took things as they came (p. 1210) along. He was prepared to deal with tragedies that he came across in his life.

And there has been some talk about this being a tragedy. Well let's get one thing straight. This isn't a tragedy. Tragedy is a birth defect, something over which we have no control. This is an atrocity. This was a willful, premeditated act of this defendant, who is Charleston County, on our shores, in this country, took with the most eager pleasure the life of another in the most gruesome, hard to describe and hard to believe circumstances. The appropriate punishment in this case is death.

You will find some other exhibits in this case that tell you more about a just verdict. Again this is not easy. No one takes any pleasure from it, but the proof cries out from the grave in this case. Among the personel effects that this defendant could care little about when he went through it is something that we all treasure. Speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card.

Reverend Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America, that in this country you could go to a public park and sit (p. 1211) on a public bench and not be attacked by the likes of Demetrius Gathers. Weigh the aggravating circumstances in this case. Look at it very carefully. Calmly, rationally.

Reverend Haynes believed that he could come onto our public parks and sit and be protected, that the law protected him. That Demetrius Gathers would not reign su-

preme on that public bench. And he doesn't reign supreme. The law in this case protects Reverend Minister Haynes. The proper verdict, the only verdict in this case is death. Thank you.

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PENALTY PHASE ARGUMENT OF DEFENSE COUNSEL WESCOT SANDLIN

(p. 1211) Mr. Sandlin: Ladies and gentlemen of the jury, you have already found Demetrius Gathers guilty in this case. And you are respected for that. It's important that we function as a government of laws. And that justice be done. The question before us is the same question that has been with us since the beginning of this trial, and that is: Where is the justice in a painful situation? There is no way any of us can deny that point. It's a point of agreement that I think is irrefutable.

You have already demonstrated your high regard for human life in returning the verdict that you (p. 1212) have returned. I ask you to continue that high regard, in considering the penalty in this case. We can't restore life. The law allows an option for taking a human life as a punishment. And that kind of contradiction places us constantly in a situation where we must deal with the law and its origins and its impact on society for the good of all people.

The proceedings that we are engaged in that take so much time are proceedings that seem to dwell often in the past. We must dissect what has happened. We must analyze. We must deal with the facts and the law to determine just what happened in the past. There is a reason

why we do this. That reason is so that all of us can live happily in society in a future.

I wish there were some way that Ricky Haynes could speak to us, but that is not possible. Ricky Haynes is a victim, and a victim I don't want you to forget when you go into that jury room to make the determination of sentence. Ricky Haynes has been constantly characterized as Reverend Minister Haynes. The clear implication is that he was a Christian.

I ask you to think about what the implications of that Christian faith were and are and will be in (p. 1213) the future. I ask you to think about what the State has presented and what we have presented in a situation that is filled with seeming contradictions and inconsistencies. Many unanswered questions. Questions that none of us in this room will ever be able to answer, including the defendant himself.

An example of that would be the nightclub and the return to the scene. There is no way that the defendant could have known all of what happened on the bike path. In his statement he has admitted involvement in the event. He has admitted his role. Acting with others in a crime of violence.

In his criminal record you find only one other crime of violence as a juvenile, an incident which he did not provoke, an incident in which he responded. Perhaps in a way very similar to the defendant in this case—I mean to the victim in this case.

All of us are searching for the truth, all of us are looking for justice. Part of the search for justice re-

quires compassion and mercy. In doing that, of course, any of the questions that we have to deal with that we have unanswered for us, not knowing the precise role, the exact role that Demetrius Gathers had in this death, the death of (p. 1214) Ricky Haynes, whatever doubts we have must be resolved in favor of life in prison. Life in prison certainly is punishment. It is certainly not letting someone off.

The real question, ladies and gentlemen, is where will the pain end? The pain for society, the pain for the victim's family, and the pain for the family of the defendant?

When you go into that room to make your decision, there won't be anyone who will second-guess your decision in there and the way you go about making it. You are answerable only to God, the God of us all. Blessed are the merciful.

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PENALTY PHASE INSTRUCTIONS

(p. 1216) The Court: Madame Forelady, ladies and gentlemen of the jury, the defendant, Mr. Demetrius Gathers, has withdrawn his request to make a statement to the jury. I previously indicated that he would. That request has been withdrawn.

Now, Madame Forelady, ladies and gentlemen, it now becomes your duty to decide what sentence you will recommend that this Court impose upon the defendant, Demetrius Gathers. There are three possible verdicts you are to consider in this case. One is the death penalty, which in this state is by electrocution. And the second is life imprisonment with a finding of the existence of a statutory aggravating circumstance. And the third is life imprisonment without a finding of the existent statutory aggravating circumstance.

Now the order in which I explain these three sentences is in no way a recommendation by this Court as to which sentence you should choose to recommend. It is simply that one must be stated.

By this recommendation of sentence form which I (p. 1217) hold in my hand, you the jury may recommend that this Court sentence the defendant to death. Please observe that immediately below the body of this recommendation there are twelve lines. That is where, should you decide to recommend the death penalty, each one of the deliberating jurors will sign his or her name.

It is the law in this state, Madame Forelady, ladies and gentlemen of the jury, that a recommendation for the imposition of the death penalty be a unanimous recommendation, and that each and every deliberating juror sign his or her name to the recommendation form.

I will now read to you the text of this form. It states: "We, the jury, in the above-entitled case, having found beyond a reasonable doubt the existence of the following statutory aggravated circumstance . . ."—at this point there is a place provided for you to write such circumstance, about which I will instruct you further— ". . . now recommend to the Court that the defendant, Demetrius Gathers, be sentenced to death."

Now for this recommendation to be made—that is, that the defendant be sentenced to death—you must first find that a statutory aggravating (p. 1218) circumstance

existed beyond a reasonable doubt. What is a statutory aggravated circumstance? It is a fact, an incident, a detail or an occurrence which the General Assembly of this state has declared by statute would make worse—that is, aggravate—the offense of murder when the two occur together. In other words, it is something which increases the enormity or adds to the injurious consequences of the offense.

Upon this sheet of paper which I hold in my hand are written the words "statutory instructions." You will have this sheet of paper with you in your jury room during your deliberations. The body of this form states, and I quote: "In determining whether to recommend that the defendant, Demetrius Gathers, be sentenced by the Court to life imprisonment or death, you may consider the following statutory aggravating circumstances, to wit: That the murder was committed while in the commission of rape, criminal sexual conduct in the first degree."

The old statutory statute described as rape has been amended in this state to refer to the offense involving a sexual battery as criminal sexual conduct in the first degree, which I previously (p. 1219) explained to you in the guilt phase of this trial.

Now, Madame Forelady, let me emphasize to you that this is the only circumstance you may consider as an aggravating circumstance. Should you find, and it must be a unanimous finding—that is, a finding by each and every one of the deliberating jurors—should you find that the State has proven beyond every reasonable doubt the existence of the aggravating circumstances listed on this sheet of paper, then you would be authorized, which is to say

permitted, to consider recommending to this Court that the defendant be sentenced to death.

What do I mean by the term proven beyond a reasonable doubt? What I do not mean is a weak doubt, or a fanciful doubt. But rather it is a doubt which the name itself suggests, a doubt for which you can give a reason.

And please pay particular attention to this. You are never required to recommend the death penalty. Even if you find that a statutory aggravating circumstances existed at the time the offense occurred.

I instruct you further that should you find the State has not proven that such a circumstance existed, that is to say you find that you still have (p. 1220) some reasonable doubt as to the existence of such a circumstance, then you would not be authorized to recommend the death penalty. And your recommendation must be life imprisonment.

Now should you find beyond a reasonable doubt that the aggravated circumstance listed on this sheet of paper existed at the time of the murder, and should you then decide after weighing such finding against the elements in favor of a recommendation of life imprisonment, about which I will instruct you later ,that the recommendation of the jury is to be that the defendant be sentenced to death, then it would be your duty, Madame Forelady, to write on the recommendation of sentence form the statutory aggravating circumstace which you have found.

That is to be written in these lines. Which is in the body of "Recommendation of sentence, death penalty." Then, Madame Forelady, you and each and every juror

would sign your name in the places provided. And I trust that you understand that.

By these forms which I hold in my hand, you the jury can recommend to this Court that the defendant be sentenced to life imprisonment. I will now read the text of these recommendations forms. "We, the (p. 1221) jury, in the above-entitled case, recommend to the Court that the defendant, Demetrius Gathers, be sentenced to life imprisonment." And you will see under that heading in parenthesis, "without finding the existence of an aggravating circumstance."

The second—or the third form which I will read is that: "We, the jury, in the above-entitled case, having found beyond a reasonable doubt the existence of the following statutory aggravating circumstance, to wit: . . ." — " . . . now recommend to the Court that the defendant, Demetrius Gathers, be sentenced to life imprisonment."

As I said to you earlier, you had three possibilities. You could recommend to the Court that the defendant be sentenced to death. You could recommend to the Court that the defendant be sentenced to life imprisonment with finding of the existent aggravated circumstances. And you can make a finding recommending a sentence of life imprisonment without finding the existence of an aggravated circumstance.

The latter two possibilities involve the difference between finding the existence of a statutory aggravating circumstance and finding no aggravated circumstance. In either event you could (p. 1222) recommend that the defendant be sentenced to life imprisonment.

Please note that, although you must unanimously agree to recommend life imprisonment, only the Forelady is required to sign either one of these two recommendations. They differ in the recommendation of sentence for the death penalty, because in that instance each juror, deliberating juror, must sign this form.

I will now instruct you on what you may consider in making your decision as to which sentence to recommend. As I previously instructed, if you find the existence beyond a reasonable doubt of a statutory aggravating circumstance, then you are permitted, but not required, to recommend the death penalty.

There are three conditions which you should consider in reaching your decision. First, whether the defendant has proven by any evidence the existence of a statutory mitigating circumstance. Second, whether the defendant has proven by any evidence the existence of any other mitigating circumstance. And third, whether for any reason you can think of, or for no reason at all, the defendant should be sentenced to life imprisonment.

(p. 1223) What is a statutory mitigating circumstance? It is a fact, an incident, a detail or an occurrence which the General Assembly of this state has declared by statute would reduce the severity of the offense of murder. In other words, it is a circumstance recognized by statute as one which, in fairness and mercy, may be considered as extenuating or as reducing the degree of moral culpability for the commission of the act of murder.

A mitigating circumstance is neither justification nor nor excuse for the murder. It simply lessens the degree

of one's guilt. That is, makes him less blameworthy or less culpable.

What statutory mitigating circumstances should you consider in this case? I am holding up the form which you will have in your jury room called statutory instructions. I refer once again to this sheet. Immediately below the listing of the statutory aggravating circumstances, which I read to you earlier, the text continues: "You may also consider the following statutory mitigating circumstance. One, the age and mentality of the defendant at the time of crime. Two, the defendant has no significant history of prior criminal conviction involving the use of violence against (p. 1224) another person. Three, the murder was committed while the defendant was under the influence of mental or emotional disturbance. Four, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

You may also consider any nonstatutory mitigating circumstances. A nonstatutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant claims serves the same purpose. That is, to reduce the degree of his guilt in the offense. While there must be some evidence which supports a finding by you that a statutory or nonstatutory mitigating circumstance exists, you need not find the existence of such a circumstance beyond a reasonable doubt.

In reaching your decision as to which sentence to recommend, you will weigh the aggravating and mitigating circumstances. While an aggravating iircumstance must be found before you can even consider recommending the

death penalty, once such finding is made beyond a reasonable doubt you may recommend the death sentence, even though you find the existence of a statutory mitigating circumstance. In other words, the existence of an (p. 1225) alleged statutory mitigating circumstance is not a bar to the imposition of the death penalty.

The third element you may consider, if you should conclude that a statutory aggravating circumstance exists, is whether the defendant should be sentenced to life imprisonment for any reason or for no reason at all. This is what has been traditionally referred to as a recommendation of mercy. And should such be your decision you would so indicate by returning to the Court whichever recommendation of life imprisonment form that is consistent with your finding.

Now let me again remind you that you will have two forms with you in the jury room dealing with a recommendation of life imprisonment. Should you decide to recommend that the defendant be sentenced to life imprisonment, you need not sign both. You must only sign one. One deals with the finding of—or the existence of an aggravated circumstance, and one deals with finding no aggravated circumstance.

In any instance, should you choose to recommend life imprisonment, your decision must be a unanimous one, and again only the foreperson would be required to sign either one of these two recommendation (p. 1226) forms.

Now, Madame Forelady, ladies and gentlemen of the jury, there is a legal theory in South Carolina which can be used in determining guilt called the hand of one is the hand of all. If certain persons are together, acting to-

gether, assisting each other in the commission of an offense, the law says under those circumstances the act of one is the act of all.

This legal theory is restricted to a determination of guilt. I purposefully did not instruct you in this regard during the guilt phase of this trial because the defendant was charged with capital murder. And if he was found guilty we would have to hold, as I previously explained to you, a separate or punishment phase of this trial in which the jury would have to determine the punishment.

I now want to instruct you emphatically that under a decision from the United States Supreme Court an accomplice in the commission of a felony in the course of which a murder is committed by others may not be subjected to the imposition of the death penalty if he does not himself kill, attempt to kill, or intend that a killing take place, or that lethal force be employed.

(p. 1227) The imposition of the death penalty in such a case is violative of the defendant's Eighth Amendment rights. The defendant's criminal culpability must be limited to his participation in the death of and criminal sexual conduct against the defendant, Richard Haynes.

Now, Madame Forelady, ladies and gentlemen, what I am saying to you is, in order for you to bring in a verdict in this phase of the trial which calls for the imposition of the death penalty, you must find beyond a reasonable doubt that the defendant, Demetrius Gathers, did himself kill, attempted to kill, or intended that the killing of Richard Haynes be accomplished.

I do not mean by this that should you find that the defendant Demetrius Gathers did in fact kill, attempted to

kill, or intended to kill the victim Richard Haynes that you are required to bring in a verdict which calls for the imposition of the death penalty. You therefore must pay special attention to the totality of my charge on what your verdict alternatives are.

In this phase of the trial, Madame Forelady, ladies and gentlemen, you have heard about the defendant's past criminal record. I tell you that (p. 1228) proof of a prior criminal record on the part of the defendant should not be used to determine the existence of an aggravated circumstance. Such proof is admitted into evidence for the sole purpose of showing the defendant's character and no more.

Now, Madame Forelady, ladies and gentlemen, I will now summarize what I have just told you. You will have in your jury room during your deliberations four forms. One, recommendation of life in prison form with finding of the existence of an aggravating circumstance. Two, recommendation of life imprisonment form without finding the existence of an aggravated circumstance. Three, recommendation of death penalty form. And, four, statutory instructions.

The statutory instructions state the only aggravating circumstance you shall consider in this case. Should you fail to find beyond a reasonable doubt this circumstance existed at the time the murder was committed, then you would go no further. Your recommendation must be for life imprisonment. Should you find beyond a reasonable doubt the existence of an aggravated circumstance, you would then be authorized to consider recommending the death penalty.

(p. 1229) In your deliberations you will consider any statutory or nonstatutory mitigating circumstances which

are supported by the evidence. You will weigh the aggravating circumstance you found against the mitigating circumstances, and you will then decide whether you will recommend the death penalty or life imprisonment. You may also consider any other factor in mitigation of the offense. And you can recommend a sentence of life imprisonment for no reason at all.

If you decide to recommend the death penalty, you will complete the proper form. You must write out the aggravating circumstance that you found. And all twelve deliberating jurors must sign the recommendation. Should you decide to recommend life imprisonment under either of the two possibilities that I have given you, the foreperson only must sign the appropriate recommendation. And no reason is to be given for your decision.

Whatever your recommendation is, it must be a unanimous one. That is to say, it must be the verdict of each and every juror.

In considering whether to recommend whether the defendant is to be sentenced to death or life imprisonment, I charge you that as jurors you must (p. 1230) decide the issue involved in this proceeding without bias and without prejudice to any party. You cannot allow yourselves to be governed by mere sympathy, by prejudice, by passion or by public opinion. Both the State and the defendant have the right to expect that each of you will carefully and impartially consider all the evidence in the case, and that you will follow the law as I have explained it to you.

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DEFENSE COUNSEL OBJECTION

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(p. 1234) Mr. Kent: In addition, Your Honor, we would like to note our objection to the State's argument to the jury concerning the prayer that was read. We believe that it's an appeal to passion and improper argument. We would move the Court for a mistrial of the penalty phase of this proceeding, or in the alternative, Your Honor, if the Court does not grant (p. 1235) us the mistrial, to remove that exhibit from the jury's consideration at this time.

The Court: Is it an exhibit in the trial?

Mr. Condon: Yes, Your Honor.

Mr. Kent: Yes, it is. It's part of the papers.

The Court: All right, sir.

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OPINION OF THE
SOUTH CAROLINA SUPREME COURT
THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Demetrius Gathers, ... Appellant.

Appeal from Charleston County
Richard E. Fields, Judge

Opinion No. 22878
Heard March 8, 1988 - Filed June 6, 1988

AFFIRMED IN PART; REVERSED IN PART;
AND REMANDED

Assistant Appellate Defender Joseph L. Savitz, of the South Carolina Office of Appellate Defense, of Columbia; and Public Defender Joseph F. Kent, of Charleston for Appellant.

Attorney General T. Travis Medlock, Chief Deputy Attorney General Donald J. Zelenka, both of Columbia; and Solicitor Charles M. Condon, of Charleston, for Respondent.

GREGORY, C.J. Appellant was convicted of murder and first degree criminal sexual conduct and sentenced to

death. We affirm his convictions, reverse the death sentense, and remand for a new sentencing proceeding.

The victim, Richard Haynes, was a thirty-two-year-old black male. He was a self-proclaimed preacher and called himself "Reverend Minister." Haynes was attacked and killed by four black youths. He was stabbed in the stomach, beaten on the head with a bottle, and his rectum perforated by an umbrella inserted in his anus.

One of the four youths, Steven Hardrick, agreed to testify for the state in exchange for a guilty plea to misprison of a felony. Hardrick testified that he and three others, including appellant, came across the victim late one night at a park bench on a bicycle path. The victim was changing his clothes. Appellant and the victim exchanged some words and appellant then struck the victim in the face. Another youth, Zandall Hayes, also struck the victim. Appellant pinned the victim to the ground while a third youth, Dee Brown, kicked and beat him. They then smashed a bottle on the victim's head.

When the victim stopped moving, Hardrick nudged him with his foot. Hardrick, Brown, and Hayes then left the scene while appellant remained with the victim. The others looked back and saw appellant beating the victim with an umbrella. Hardrick saw appellant push the umbrella into the victim's anus. Appellant then rejoined the others. Appellant and Hayes, however, returned to the victim once more. Appellant said he stabbed the victim with a knife.

During the altercation, the youths rummaged through the victim's belongings and found two Bibles and various

religious articles. These articles were admitted into evidence at the guilt phase of trial.

Appellant confessed to his involvement in the murder but claimed Brown was the main aggressor.

GUILT PHASE

Appellant complains the solicitor injected an arbitrary factor into the jury's deliberation of guilt by attacking appellant's character when appellant had not put his character in issue. The solicitor stated:

> Let me first stop to point this out. Someone like Demetrius Gathers is not going to be talking about what he did to the minister over here at the Episcopal Church on the corner or the pastor at Morris Brown A.M.E. Church. Who is he going to be talking to: His own ilk. Who is that? Well, you have people out there like Rose Campbell; Jerome Heyward; James, known as Jeff, Carter. You had a chance to evaluate them. They weren't your sterling citizens that come forward after they heard about all this, but they did testify, and you did have a chance to hear what they had to say.
>
> What do all of them say, to a person? And why would they make this up? They all agree—again Steven Hardrick has been corroborated—that this defendant, this defendant along with Zandell Hayes, went back on that track after they left, just as Steven Hardrick told you. It's been corroborated and corroborated again. So it's just not Steven Hardrick's word.

The persons named by the solicitor are those who testified regarding what appellant said he had done to the victim. Appellant argues the solicitor's statements imply

appellant is a person of bad character by association. We disagree.

Taken in context, these remarks were not an improper comment on appellant's character. The solicitor's argument concerning the credibility of the State's witnesses is within the record and its reasonable inferences. *State v. Cockerham*, — S.C. —, 365 S.E.2d 22 (1988); *State v. Durden*, 265 S.C. 86, 212 S.E.2d 587 (1975). We find no error.

Appellant next contends the solicitor improperly disparaged the exercise of his constitutional rights and contrasted those rights with "the trial and execution" of the victim.

The solicitor's comments regarding appellant's rights to a lawyer and to remain silent are in reference to the voluntariness of appellant's confession, a factual issue submitted to the jury and therefore properly argued.

The solicitor also referred to appellant's right to confront witnesses and stated: "Contrast that in your mind's eye with the trial and the execution of Richard Haynes." This single comment does not rise to the level of prejudice found in *State v. Cockerham, supra*, where the solicitor's extensive comments constituted reversible error. In the context of the entire record, we hold any error harmless beyond a reasonable doubt. *State v. Cockerham, supra; see also State v. Bell*, 293 S.C. 391, 360 S.E.2d 706 (1987).

Next, appellant claims the trial judge should have *sua sponte* charged the jury on the defense of alibi based

on his first pre-arrest statement to police that he was not at the scene at the time of the murder. We disagree.

Appellant first stated he was at Rose Campbell's home at Starcastle Apartments from 9:30 p.m. until 1:00 or 1:30 a.m. the night of the murder. The record indicates the murder occurred between 10:00 to 11:00 p.m. on the bicycle path behind Starcastle Apartments. This pre-arrest statement was introduced into evidence by the State to show appellant changed his story when he later confessed to some involvement in the murder.

Appellant did not raise a defense of alibi at trial. In fact, his lawyer stated at the commencement of trial: "For the record . . . there will be no evidence of alibi." During closing argument, defense counsel further stated: "There is no question that he [appellant] was involved in beating him up."

In light of appellant's disavowal of an alibi defense, it was clearly proper that the trial judge did not charge alibi. Moreover, in view of the overwhelming evidence of appellant's guilt, we hold any error harmless beyond a reasonable doubt. *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985).

Next, appellant complains the trial judge improperly charged the jury on implied malice.

The trial judge charged the jury that malice may be implied from the intentional doing of an unlawful act where no excuse or legal provocation appears. This charge was proper. *State v. Crocker*, 272 S.C. 344, 251 S.E.2d 764 (1979). Appellant contends, however, the trial judge's charge requiring the jury to determine guilt or innocence

"based upon the evidence" impermissibly shifted the burden to appellant to prove an excuse.

This argument is without merit. Nowhere in the charge does the judge mention the need for rebuttal or explanation of the evidence presented by the State. Moreover, the judge's charge comports with the requirement that it is for the jury to determine from all the evidence whether or not malice is proven. *State v. Patrick*, 289 S.C. 301, 345 S.E.2d 481 (1986).

Appellant next contends his conviction for first degree criminal sexual conduct should be reversed because of an alleged violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). We disagree.

Pursuant to appellant's request for disclosure of evidence, the State provided an autopsy report prepared by Dr. Conradi. The report stated that the rectal wound was a contributory injury. At her meeting with defense counsel before trial, Dr. Conradi explained the sexual battery occurred "perimortem" or as death was occurring.

Appellant complains the State did not disclose evidence that Dr. Conradi equivocated as to whether the rectal wound was pre- or post-mortem at an early interview with a co-defendant's counsel. He contends this information would have allowed effective impeachment of Dr. Conradi at trial.

In determining the materiality of nondisclosed evidence, this Court will consider it in the context of the entire record. *State v. Osborn*, 291 S.C. 265, 353 S.E.2d 276 (1987). The State's failure to disclose information warrants a reversal as a *Brady* violation only if the omission

deprived the defendant of a fair trial. *Id.; State v. Thompson*, 276 S.C. 616, 281 S.E.2d 216 (1981); *see also U. S. v Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Appellant effectively cross-examined Dr. Conradi at trial and she conceded she had previously expressed an opinion she was unsure whether the rectal wound was before or after death. She further explained it was now her firm opinion the wound was pre-mortem. Because appellant has failed to show any prejudice from the alleged nondisclosure, we hold there was no error.

Accordingly, we affirm appellant's convictions for murder and first degree criminal sexual conduct.

SENTENCING PHASE

Appellant contends the solicitor's closing argument at the sentencing phase of trial violated *Booth v. Maryland*, 482 U.S. —, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), by focusing extensively on the personal characteristics of the victim. We agree.

The solicitor's argument included these remarks:

> We know from the proof that Reverend Minister Haynes was a religious person. He had his religious items out there. . . . Among the many cards that Reverend Haynes had among his belongings was this card. It's in evidence. Think about it when you go back there. He had his religious items, his beads. He had a plastic angel. Of course, he is now with the angels now, but this defendant Demetrius Gathers cared little about the fact that he is a religious person. . . . But look at Reverend Minister Haynes' prayer. It's called "The Game Guy's Prayer." "Dear God, help me to be a sport in this little game of life. I don't ask for any easy place in this line-up. Play me anywhere you need me. I only ask you for the stuff to give you 100% of what I have got. If all the hard drives seem to come my way, I thank you for the compliment. Help me to remember that you won't ever let anything come my way that you and I together can't handle. And help me to take the bad break as part of the game. Help me to understand that the game is full of knots and knocks and trouble, and make me thankful for them. Help me to be brave so that the harder they come the better I like it. And, oh God, help me always to play on the square. No matter what the other players do, help me to come clean. Help me to study the book so that I'll know the rules, to study and to think a lot about the greatest player that ever lived and other players that are portrayed in the book. If they ever found out the best part of the game was helping other guys who are out of luck, help me to find it out, too. Help me to be regular, and also an inspiration with the other players. Finally, oh God, if fate seems to uppercut me with both hands, and I am laid on the shelf in sickness or old age or something, help me to take that as part of the game, too. Help me not to whimper or squeal that the game was a frame-up or that I had a raw deal. When in the falling dusk I get the final bell, I ask for no lying, complimentary tombstones. I'd only like to know that you feel that I have been a good guy, a good game guy, a saint in the game of life." Reverend Minister Haynes, we know, was a very small person. He had his mental problems. Unable to keep a regular job. And he wasn't blessed with fame or fortune. And he took things as they came along. He was prepared to deal with tragedies that he came across in his life.
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> Among the personal effects that this defendant could care little about when he went through it is something that we all treasure. It speaks a lot about Reverend Minister Haynes. Very simple yet very profound. Voting. A voter's registration card. Reverend

> **Haynes believed in this community. He took part. And he believed that in Charleston County, in the United States of America that in this country you could go to a public park and sit on a public bench and not be attacked by the likes of Demetrius Gathers.**

In *Booth*, the United States Supreme Court held the victim's personal characteristics are not proper sentencing considerations in a capital case. 107 S.Ct. at 2535. The Court reasoned there is no justification for permitting a capital sentencing decision "to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character." 107 S.Ct. at 2534. Moreover, it would would be impossible to provide the defendant "a fair opportunity to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant." 107 S.Ct. at 2535. The Court concluded the injection of the victim's personal characteristics into the sentencing determination violated the Eighth Amendment.

The solicitor's extensive comments to the jury regarding the victim's character were unnecessary to an understanding of the circumstances of the crime. *Cf. State v. Bell*, 293 S.C. 391, 360 S.E.2d 706 (1987). These remarks conveyed the suggestion appellant deserved a death sentence because the victim was a religious man and a registered voter. Because the solicitor's remarks violated appellant's eighth amendment rights, we reverse the death sentence. *Accord State v. Haskins*, *supra* (evidence of victim's bad character not admissible as mitigating evidence in sentencing phase).

We need not address appellant's remaining exceptions. Appellant's convictions are affirmed, the death sentence

reversed, and the case is remanded for a new sentencing proceeding.

AFFIRMED IN PART; REVERSED IN PART; and REMANDED.

HARWELL, CHANDLER, FINNEY, JJ., and Acting Associate Justice J. B. Ness, concur.